No. 06-

IN THE

Supreme Court of the United States

PHILADELPHIA HOUSING AUTHORITY,
Petitioner,

v.

VANESSA HENDERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

ALAN C. KESSLER *
SUSAN J. FRENCH
VIRGINIA LYNN HOGBEN
WOLF, BLOCK, SCHORR AND
SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
(215) 977-2000

Counsel for Petitioner
Philadelphia Housing Authority

* Counsel of Record

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in requiring that a district court keep in place in perpetuity a 22-year-old consent decree regulating a government agency, a public housing agency, simply "to hold the parties to their bargain," even though need for a consent decree had been superseded by subsequent federal regulations, there was no history of any noncompliance with the consent decree and the district court which had entered the consent decree concluded that it was no longer necessary?

LIST OF PARTIES

The plaintiffs in this proceeding are Vanessa Henderson, an individual, as a representative of a class of individual recipients of Section 8 rental assistance from the Philadelphia Housing Authority ("PHA"). The defendants are PHA, a governmental party, and six former PHA officials, Anthony Morrone, Thomas J. Kelly, Jr., Thomas McIntosh, Harry Sewell, Hermine Hart, Carmelita Thill, and Dante Mattioni. No corporate disclosure statement is required because there are no nongovernmental corporations who are a party to this proceeding.

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OPINIONS AND ORDERS OF THE COURTS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit, No. 05-5317 (3d Cir. January 25, 2007), are unpublished but are reported at 2007 WL 186764 and 2007 U.S. App. Lexis 1681. The order of the United States District Court, Civil Action No. 79-4190 (E.D. Pa. November 8, 2005), is unreported. Copies of the Court of Appeals' and District Court's opinions and orders are provided in the Appendix hereto at App. 1a-10a and App. 11a-12a respectively.

Petitioner's Petition for Rehearing in the Court of Appeals was denied by the Court of Appeals by Order dated February

22, 2007. A copy of that February 22, 2007 Order is also provided in the Appendix at App. 13a-14a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 25, 2007. A timely petition for rehearing was filed by petitioner Philadelphia Housing Authority on February 8, 2007. The petition for rehearing was denied by order of the Court of Appeals dated February 22, 2007. (App. 13a-14a). This Court has jurisdiction to review the judgment of the Court of Appeals for the Third Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

FEDERAL REGULATIONS INVOLVED

Section 982.555 of the United States Department of Housing and Urban Development's regulations (24 C.F.R. § 982.555) governs the right to a hearing for participant families receiving rental assistance from a public housing agency (referred to in the regulations as "a PHA") under the federal Section 8 low-income housing assistance program. Section 982.555 provides in relevant part:

> **§ 982.555 Informal hearing for participant.**
>
> (a) *When hearing is required.* (1) a PHA must give a participant family an opportunity for an informal hearing to consider whether the following PHA decisions relating to the individual circumstances of a participant family are in accordance with the law, HUD regulations and PHA policies:
>
> (i) A determination of the family's annual or adjusted income, and the use of such income to compute the housing assistance payment.
>
> (ii) A determination of the appropriate utility allowance (if any) for tenant-paid utilities from the PHA utility allowance schedule.

(iii) A determination of the family unit size under the PHA subsidy standards.

(iv) A determination that a certificate program family is residing in a unit with a larger number of bedrooms than appropriate for the family unit size under the PHA subsidy standards or the PHA determination to deny the family's request for an exception from the standards.

(v) A determination to terminate assistance for a participant family because of the family's action or failure to act (see § 982.552).

(vi) A determination to terminate assistance because the participant family has been absent from the assisted unit for longer than the maximum period permitted under PHA policy and HUD rules.

(2) In the cases described in paragraphs (a) (1) (iv), (v) and (vi) of this section, the PHA must give the opportunity for an informal hearing before the PHA terminates housing assistance payments for the family under an outstanding HAP contract.

* * *

(c) *Notice to family.* (1) In the cases described in paragraphs (a)(1) (i), (ii) and (iii) of this section, the PHA must notify the family that the family may ask for an explanation of the basis of the PHA determination, and that if the family does not agree with the determination, the family may request an informal hearing on the decision.

(2) In the cases described in paragraphs (a)(1) (iv), (v) and (vi) of this section, the PHA must give the family prompt written notice that the family may request a hearing. The notice must:

—

(i) Contain a brief statement of reasons for the decision,

(ii) State that if the family does not agree with the decision, the family may request an informal hearing on the decision, and

(iii) State the deadline for the family to request an informal hearing.

(d) *Expeditious hearing process.* Where a hearing for a participant family is required under this section, the PHA must proceed with the hearing in a reasonably expeditious manner upon the request of the family.

(e) *Hearing procedures*—(1) *Administrative plan.* The administrative plan must state the PHA procedures for conducting informal hearings for participants.

(2) *Discovery*—(i) *By family.* The family must be given the opportunity to examine before the PHA hearing any PHA documents that are directly relevant to the hearing. The family must be allowed to copy any such document at the family's expense. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing.

(ii) *By PHA.* The PHA hearing procedures may provide that the PHA must be given the opportunity to examine at PHA offices before the PHA hearing any family documents that are directly relevant to the hearing. The PHA must be allowed to copy any such document at the PHA's expense. If the family does not make the document available for examination on request of the PHA, the family may not rely on the document at the hearing.

(iii) *Documents.* The term "documents" includes records and regulations.

(3) *Representation of family.* At its own expense, the family may be represented by a lawyer or other representative.

(4) *Hearing officer: Appointment and authority.* (i) The hearing may be conducted by any person or persons designated by the PHA, other than a person who made or approved the decision under review or a subordinate of this person.

(ii) The person who conducts the hearing may regulate the conduct of the hearing in accordance with the PHA hearing procedures.

(5) *Evidence.* The PHA and the family must be given the opportunity to present evidence, and may question any witnesses. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.

(6) *Issuance of decision.* The person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. A copy of the hearing decision shall be furnished promptly to the family.

* * *

A copy of 24 C.F.R. § 982.555 is reproduced in its entirety in the Appendix at App. 15a-19a.

STATEMENT OF THE CASE

This is an appeal from a ruling that requires a district court to keep in place in perpetuity a 22-year-old consent decree which regulates a government agency, the Philadelphia Housing Authority ("PHA"). The district court had vacated the Consent Decree on grounds that it had been superseded by

United States Department of Housing and Urban Development ("HUD") regulations, its purpose had been fully satisfied, and it was no longer needed. The Third Circuit decision in this case reversed the district court's vacatur of the Consent Decree, holding that the Consent Decree must remain in effect in perpetuity unless it requires PHA to violate HUD regulations, in order "to hold the parties to their bargain." (App. 10a).

PHA is a public housing agency created by Pennsylvania as an agency of the Commonwealth of Pennsylvania. 35 Pa. Stat. § 1544(a), § 1550. PHA provides subsidized low-income housing and low-income housing assistance in accordance with the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.* and HUD regulations promulgated pursuant to that Act.

The Consent Decree regulates hearing procedures which PHA must follow in terminating assistance payments under the federal Section 8 Housing Program, 42 U.S.C. § 1437f. The Section 8 program is a low-income housing program under which participant families live in privately owned housing, and the housing agency, in this case PHA, pays all or part of the participant family's rent. 42 U.S.C. § 1437f. (*See also* App. 2a, 27a).

On November 19, 1979, plaintiff, then a recipient of Section 8 rental assistance from PHA, brought this case as a class action under 42 U.S.C. § 1983 against PHA, and certain officers, directors and employees of PHA. (App. 21a, 24a-26a). Plaintiff alleged that PHA had terminated her Section 8 rental assistance without any prior hearing and that PHA had no constitutionally adequate written procedures providing for a hearing before terminating Section 8 assistance. (App. 24a, 27a-30a). Plaintiff claimed that termination of Section 8 benefits without a prior hearing violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (App. 30a).

On April 27, 1983, the district court approved a Consent Decree specifying an informal hearing procedure for Section 8 recipients to challenge termination from the Section 8 program. (App. 22a, 36a-43a). The Consent Decree required PHA to give notice of a decision to terminate Section 8 assistance stating the reason for termination, and if the tenant requested a hearing, required that PHA provide the tenant an informal hearing before assistance was terminated. (App. 38a-41a).

At the time this action was brought in 1979 and when the Consent Decree was entered in 1983, there were no federal regulations in effect providing any procedural protections to Section 8 recipients when a housing agency terminated their rental assistance. Subsequent to the Consent Decree, however, HUD promulgated regulations providing notice and hearing procedures for termination of Section 8 rental assistance, 24 C.F.R. § 982.555. (App. 15a-19a). The post-Consent Decree HUD regulations require that all public housing agencies provide notice and the opportunity for an informal hearing before termination of Section 8 assistance and specify procedural protections which the notice and pretermination hearing must satisfy. 24 C.F.R. § 982.555.

No contempt or enforcement proceedings were ever brought in this case during the more than 22 years that the Consent Decree was in effect. (App. 5a-6a, 22a). Because the HUD regulations satisfy the Consent Decree's purpose of providing due process protections to Section 8 recipients, PHA, on November 9, 2004, filed a motion to vacate the Consent Decree. (App. 22a). Plaintiff, in response to PHA's motion to vacate, did not make any claim that the HUD regulations were constitutionally inadequate. (App. 51a).

The motion to vacate the Consent Decree was heard by the same judge who had been assigned to this case from its inception and who had approved the Consent Decree. (App. 21a, 36a, 41a, 45a). The district court judge, who was

familiar with the reasons for the Consent Decree, concluded that because of the HUD regulations "there is not now any realistic problem from which the consent decree protects anyone" and found that "the purpose of the consent decree has been satisfied." (App. 12a, 52a). Accordingly, the district court granted PHA's motion to vacate and entered an Order vacating the Consent Decree on November 8, 2005. (App. 11a-12a, 23a).

On January 25, 2007, however, the United States Court of Appeals for the Third Circuit reversed the district court. (App. 1a-10a). The Third Circuit agreed that the subsequent HUD regulations constituted "a significant change in the law." (App. 9a). Despite this fact and the fact that the Consent Decree regulates a government agency, however, the Third Circuit held that the Consent Decree must remain in effect and cannot ever be vacated absent a conflict between the Consent Decree and HUD regulations which would require PHA to violate HUD regulations. (App. 8a-10a). Despite the determination of the judge who presided over this case for its entire 26-year history that "the purpose of the consent decree has been satisfied" (App. 12a), the Third Circuit held that absent a direct and irreconcilable conflict with federal regulations, the Consent Decree must remain in effect in perpetuity "to hold the parties to their bargain." (App. 10a).

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision reversed a district court for vacating a 22-year old consent decree, notwithstanding that it was undisputed that there had been a significant change of law and there was no longer any need for the decree to protect any federal constitutional or statutory right. The Third Circuit's decision thus conflicts with and violates limitations which this Court has placed on federal courts' regulation of governmental agencies. *See Frew v. Hawkins*, 540 U.S. 431 (2004); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

A second reason for granting certiorari is that the Third Circuit's decision is in conflict with the decision of another circuit, the United States Court of Appeals for the Eleventh Circuit, on the same issue.

The impact of the Third Circuit's decision extends beyond this Consent Decree and these parties. It effectively forces district courts in the Third Circuit to continue court regulation of government agencies even where the district court has found that the purpose of the court supervision has been satisfied and no need for court supervision exists.

The Third Circuit's refusal to follow this Court's precedents demonstrates that the lower courts have not understood this Court's precedents and that further direction from this Court is needed.

A. The Third Circuit's Decision Requiring A District Court To Regulate A Government Agency In Perpetuity Conflicts With The Decisions Of This Court That Federal Court Regulation Of Government Agencies Must Terminate Once The Need For Court Involvement Has Ceased

A consent decree involving a government agency is not a "bargain" between private parties. This Court has made clear that unnecessary court regulation of state and local officials exceeds the proper role of the federal courts and violates fundamental principles of federalism. *Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004). Where a consent decree regulates a government agency, the presumption is that the decree should *not* remain in effect in perpetuity and that the decree must be terminated as soon as the need which it addressed has been met. *Frew*, 540 U.S. at 442; *Board of Education v. Dowell*, 498 U.S. 237, 248 (1991).

This Court specifically instructed the lower federal courts three years ago in *Frew v. Hawkins* that:

> "If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers.
>
> * * *
>
> *The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials. . . . A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenue and resources.* The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court should make the necessary changes. . . ."

Frew, 540 U.S. at 441-42 (emphasis added).

In *Board of Education v. Dowell*, this Court reversed a court of appeals decision which had barred dissolution of a desegregation decree regulating a school district. This Court explained that a restrictive standard for terminating regulation of a government agency was not consistent with "the allocation of power within our federal system" and that "[s]uch decrees . . . are not intended to operate in perpetuity." 498 U.S. at 248.

Consistent with these fundamental principles of federalism, this Court held in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), that where a consent decree regulates a government agency, requests to eliminate consent decree requirements should be granted if the government agency shows "a significant change in either factual conditions or law." 502 U.S. at 383-84. This Court in *Rufo* recognized that

consent decrees involving government agencies cannot be treated as pure contractual obligations, that despite the partial contractual attributes of consent decrees, a consent decree which regulates a government agency is "a judicial decree that is subject to the rules generally applicable to other judgments and decrees." 502 U.S. at 378. This Court further made clear in *Rufo* that the lower courts "should exercise flexibility in considering requests for modification of an institutional reform consent decree." 502 U.S. at 383. *See also Frew*, 540 U.S. at 906.

The decision of the Third Circuit in this case disregarded *Rufo*'s "significant change" standard and has imposed on district courts an extreme position directly contrary to this Court's decisions in *Frew* and *Dowell*. The Third Circuit did not merely permit a consent decree to continue in place. Rather, the Third Circuit has *required* the district court to maintain *in perpetuity* a more than 22-year-old consent decree which the district court found unnecessary and which was undisputedly superseded by subsequent constitutionally adequate regulations, even though the Third Circuit itself recognized that those regulations constituted a "significant change in the law." (App. 9a).

This is not a decision that turned on any factual dispute. The key facts which required vacatur of this Consent Decree were completely undisputed and were accepted as established by the Third Circuit.

There was no dispute that there was a significant change which directly affected the basis for the action and Consent Decree. The foundation of both the underlying action and the Consent Decree was the absence of notice and hearing procedures for Section 8 terminations. (App. 30a, 37a). In 1984, after the Consent Decree, HUD promulgated regulations requiring housing authorities to provide notice and hearings for Section 8 terminations. 49 Fed. Reg. 12215 (March 29, 1984). Proposed regulations had been published after this

action was brought in 1979 but before the Consent Decree was agreed to by the parties in 1982 and approved by the district court in 1983. 47 Fed. Reg. 32169 (July 26, 1982). However, those proposed regulations had not been adopted by HUD, were not in effect at the time of the Consent Decree was entered, and provided no legal protection to the plaintiff class at the time of the Consent Decree. The HUD regulations were not adopted until March 1984 and became effective in May 1984, over one year after the Consent Decree was approved by the district court. 49 Fed. Reg. 12215 (March 29, 1984).

The Third Circuit recognized and agreed that there was "no doubt" that "HUD's final regulations constituted a significant change in the law." (App. 9a). There was, moreover, no dispute that the HUD Section 8 hearing regulations, 24 C.F.R. § 982.555, fully satisfy constitutional due process requirements and provide the due process protection which plaintiff sought in this action.

The HUD regulations require that local public housing agencies, including PHA, give Section 8 recipients notice of termination of Section 8 benefits, stating the reason for the termination and advising them of their right to a hearing on the termination. 24 C.F.R. § 982.555(a)(1)(v),(vi), § 982.555(c)(2). The HUD regulations also require that the hearing be offered and provided, if timely requested, before termination of those benefits. 24 C.F.R. § 982.555(a)(2). The regulations give the participant the opportunity to examine housing authority documents before the hearing, 24 C.F.R. § 982.555(e)(2)(i); the right to be represented by counsel or another representative, 24 C.F.R. § 982.555(e)(3); and the right to present evidence and question witnesses at the hearing. 24 C.F.R. § 982.555(e)(5). The HUD regulations further ensure that the hearing officer cannot have made or approved the termination decision and cannot be a subordinate of a person who made or approved the termination. 24

C.F.R. § 982.555(e)(4)(i). The hearing officer is required to give the participant a written decision stating the reasons for the decision. 24 C.F.R. § 982.555(e)(6).

These HUD regulations have been held sufficient to protect the constitutional due process rights of Section 8 participants. *Basham v. Freda*, 805 F. Supp. 930, 933-34 (M.D. Fla. 1992), *aff'd without op.*, 985 F.2d 579 (11th Cir. 1993); *Ellis v. Ritchie*, 803 F. Supp. 1097, 1105-06 (E.D. Va. 1992); *see also Vandermark v. Housing Authority of City of York*, 663 F.2d 436, 442 (3d Cir. 1981) (no due process violation where Section 8 applicant was given an opportunity to review documents and to participate in a hearing). Indeed, plaintiff admitted that the HUD regulations are sufficient to protect Section 8 recipients' constitutional rights. (App. 51a).

In addition, there was no claim or evidence of any violation of the Consent Decree or of the Section 8 participants' due process rights which could support any need for further court regulation. In the more than 22-year life of the Consent Decree there was not a single contempt proceeding or claim made of noncompliance. (App. 5a-6a). The Third Circuit specifically conceded in its opinion that "no one ever brought contempt or enforcement proceedings, and it appears that the PHA continued to perform its obligations under the decree." (App. 5a-6a).

The district court, based on these facts, concluded that the purpose of the Consent Decree had been fulfilled and that there was no longer any need for a court decree to protect the plaintiff class's rights. (App. 11a-12a). The Third Circuit did not find any error in the district court's determination that the Consent Decree was no longer needed to protect the plaintiff's constitutional rights. Instead, it held that the district court could not vacate the decree because the Consent Decree "provides greater and more specific protections" which must be enforced in perpetuity "to hold the parties to their bargain." (App. 8a-10a).

In short, the Third Circuit has required that successor administrators of a government agency be contractually bound forever to specific policies unconnected to any need to protect any federal right. That ruling is antithetical to this Court's directives in *Frew* and *Dowell*. The violation of this Court's directives is particularly glaring, as nothing in the Consent Decree provides that it is to remain in effect forever and the district court found that there was no agreement of the parties as to the decree's duration or that it would remain in effect for anything more than a reasonable time. (App. 66a-68a). The language in the Consent Decree addressing conflict with future HUD regulations did not state that the Consent Decree could not be vacated in any other circumstance. Rather, it dealt with the specific problem that PHA could not agree to anything which could place it in a position of having to violate HUD regulations. (App. 40a-41a).

Indeed, the Third Circuit's emphasis on protecting the parties' "bargain" is peculiarly inappropriate because the parties who brought the lawsuit and compromised their claims are not even the same people who seek to maintain and currently benefit from the decree. The only individuals who gave up claims in exchange for the Consent Decree's provisions were persons receiving Section 8 assistance in 1983, 24 years ago. It is unclear that any of those individuals are even beneficiaries of this Consent Decree at this time. Instead, the "greater and more specific protections" which go beyond any federal rights are benefiting only a different group, current Section 8 participants, the vast majority whom undoubtedly were not members of the class at the time of the "bargain" and gave up no rights in exchange for the specific provisions of the Consent Decree.

B. The Third Circuit's Decision Requiring A District Court To Keep In Place A Consent Decree Which Has Been Superseded By Federal Regulations Conflicts With A Decision Of The Eleventh Circuit On The Same Question

The Eleventh Circuit Court of Appeals, in *Hodge v. Department of Housing & Urban Development*, 862 F.2d 859 (11th Cir. 1989), addressed virtually the same situation as here and reached the opposite conclusion from the Third Circuit decision in this case. In *Hodge*, a class action was brought against a public housing agency asserting constitutional claims for violations of procedural due process in the agency's handling of disputes with its tenants. 862 F.2d at 860. The action was brought in 1968, before HUD promulgated formal regulations providing grievance procedures. 862 F.2d at 860. After the entry of the *Hodge* consent decree, HUD promulgated grievance regulations, and Congress in 1983 enacted a statute requiring and providing for administrative grievance procedures. 862 F.2d at 860-61.

The Eleventh Circuit held that such federal regulatory changes were grounds for vacating the consent decree. 862 F.2d at 865. The Eleventh Circuit in *Hodge* reversed the district court's ruling vacating the consent decree on the grounds that the court was required to, and failed to hold an evidentiary hearing on the motion to dissolve the injunction. 862 F.2d at 861. The court, however, analyzed whether those subsequent regulations addressed the same procedural due process concerns which were the basis for the consent decree and specifically held that the district court should vacate the consent decree, provided that the HUD regulations satisfied due process requirements. 862 F.2d at 865. The Eleventh Circuit directed:

> "On remand, the district court should first determine whether compliance with the federal laws necessarily satisfies due process. If so, *the court can dissolve the*

> *injunction, because in that event the decree merely compels an outcome consistent with the one demanded by the federal statute and regulations.* That the County might alter its grievance procedure following dissolution of the injunction is not significant, as long as any regulations adopted by the County conform to the requirements of the federal laws and procedural due process. Congress and HUD have permitted PHAs [public housing agencies] some discretion in establishing such procedures, and the Tenants cannot insist on additional or unique protection of their rights absent constitutional fault."

862 F.2d at 865 (emphasis added).

Although *Hodge* was decided three years before *Rufo*, the Eleventh Circuit in *Hodge* anticipated this Court's decision in *Rufo*. The standard for modification of a consent decree which the *Hodge* court applied was whether there was a change in the relevant law, 862 F.2d at 863-65 & n.5, essentially the same standard as the *Rufo* standard of "a significant change either in factual conditions or in law." 502 U.S. at 384. Indeed, the decisions on which *Hodge* relied, *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir. 1983), *cert. denied* 464 U.S. 915 (1983), and *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984), were cited by this Court with approval in *Rufo*. 502 U.S. at 377 n.4, 380-81. Accordingly, *Hodge*'s holding, that subsequent enactment or promulgation of constitutionally adequate procedures is a significant change in law which supports the vacatur of a consent decree, has remained good law after *Rufo*. *See, e.g., Lynch v. Sessions*, 942 F.Supp. 1419, 1426-27 (N.D. Ala. 1996)

This case is indistinguishable from *Hodge*. The Third Circuit's ruling that a district court cannot vacate a consent decree in light of subsequent HUD regulations addressing the same need is in conflict with the Eleventh Circuit's holding in

Hodge that such subsequent regulations eliminate the need for judicial regulation and supervision and require vacatur.

Indeed, the Third Circuit's decision here is also in conflict with another decision of that court itself. In *Brown v. Philadelphia Housing Authority*, 350 F.3d 338 (3d Cir. 2003), this question was addressed by a different panel of the Third Circuit, which included Justice Samuel Alito prior to his appointment to this Court. The unanimous *Brown* panel, including Justice Alito, held that vacatur of a public housing due process consent decree is appropriate where subsequent federal regulations have been promulgated which provide procedural protections for the same situation as the consent decree. 350 F.3d at 348 n.6. The unanimous *Brown* panel held that in this very type of situation, the promulgation of federal grievance hearing regulations "significantly change[d] the relevant due process landscape (originally sought to be cured by the Consent Decree)," and that, as a result, "the Consent Decree no longer had force or utility, and there was no reason for the Consent Decree to remain operative." 350 F.3d at 348 n.6.

Beyond these conflicts, guidance from this Court is particularly important because other courts of appeals have expressed uncertainty as to the proper legal standard for vacating consent decrees. Both the First Circuit and the Fourth Circuit have specifically noted that it is unclear whether vacatur of consent decrees is governed by the standards for termination of court supervision set forth by this Court in *Dowell*, by the standards for modification of consent decrees set forth by this Court in *Rufo* or by both the *Dowell* and *Rufo* standards. *See Alexander v. Britt*, 89 F.3d 194, 197-200 (4th Cir. 1996) (noting uncertainty over the proper standard but leaving the issue unresolved because the court found that neither standard was satisfied); *Inmates of Suffolk County Jail v. Rufo*, 12 F.3d 286, 291-93 (1st Cir. 1993) (same).

C. The Negative Impact Of The Third Circuit's Decision On State And Local Governments' Ability To Exercise Their Powers And Responsibilities Is Substantial

The fact that the Third Circuit's decision is unpublished and non-precedential does not negate its impact. Both the Federal Rules of Appellate Procedure and the Third Circuit's rules permit parties in other cases to use and cite this opinion. *See* Fed. R. App. P. 32.1(a); Third Cir. L.A.R. 28.3; Third Cir. Internal Operating Proc. 5.3, 5.7. The opinion, while not formally reported in a published volume, is widely available. It is publicly available on the court's website, Third Cir. Internal Operating Proc. 5.3, and is reported on both the Lexis and Westlaw electronic systems. *See* 2007 U.S. App. Lexis 1681 and 2007 WL 186764.

The only effect of the decision's non-precedential status is that the Third Circuit itself will not consider itself bound by this decision in the future. Third Cir. Internal Operating Proc. 5.7. Its impact on district courts, however, will likely be substantial. The decision reversed a district court and prohibited it from vacating a consent decree. Such a reversal, despite its "non-precedential" status, will have a chilling effect on district courts in the Third Circuit and deter the district courts from terminating unwarranted and unnecessary federal court regulation of state and local agencies.

Moreover, the negative impact of the decision on government powers and authority is substantial. The fact that this particular Consent Decree does not require active court involvement in the day-to-day administration of PHA does not make its interference minor. A state or local government "depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenue and resources." *Frew*, 540 U.S. at 442. The Third Circuit decision binds PHA inflexibly to a procedure set 24 years ago. The Third Circuit decision deprives PHA of its

right and ability to make policy judgments to best serve the needs of Section 8 program participants and to best allocate its limited resources. PHA has now been permanently locked in by the Third Circuit to a specified procedure, with any change to that procedure subject to the veto of outside parties (class action lawyers) who are neither elected nor appointed by any governmental or elected body and who are not answerable to any electorate or elected body.

The "greater and more specific protections" noted by the Third Circuit (App. 8a) adversely affect policy decisions on the allocation of government resources. The Consent Decree's requirement of "30-days notice prior to termination" (App. 5a) does not provide any added due process protection against erroneous termination of benefits. The Consent Decree does not give Section 8 recipients 30 days to contest erroneous terminations—instead, it requires the recipient to request a hearing within a much shorter 10-day period. (App. 38a) (notice of termination must notify of "the right of the recipient to request, within ten (10) days, an informal hearing"). The 10-day period to request a hearing is not significantly different from the protections afforded by the HUD regulations. The HUD regulations require that Section 8 participants be given notice of a time period to request a hearing and also require that the termination not occur until after the hearing, if such a hearing is requested. 24 C.F.R. § 982.555(a)(2),(c)(2).

Since the HUD regulations require that the hearing be provided before termination of assistance and the Consent Decree gives only 10, not 30, days to request a hearing, the 30-day notice provision does not give Section 8 participants any additional opportunity to contest the termination of assistance, or any additional protection against erroneous termination. Instead, it only delays valid terminations of assistance where the participant does not dispute that the termination is proper. Whether limited housing assistance funds should be

expended on continuing payments to persons who have been properly terminated rather than used to meet other housing needs is a policy decision on the allocation of resources which belongs in the hands of the government agency, PHA, not in the hands of the federal courts or class action lawyers. *See Frew*, 540 U.S. at 441-42.

The Consent Decree's provision that "persons 'involved in the day to day administration of the [Section 8] program' may not be hearing officers," likewise interferes with significant policy decisions. (App. 5a) (quoting Consent Decree). In promulgating its regulations, HUD considered and expressly rejected this type of prohibition because it was unnecessary and "could be detrimental to the section 8 participants, for example by depriving the hearing process of persons knowledgeable of technical requirements of the housing subsidy program, and by diverting scarce program resources to hire outside persons as hearing officers." 49 Fed. Reg. 12215, 12229-30 (March 29, 1984). Instead, HUD chose to insure impartiality by requiring that the hearing officer not have been involved in the decision in question and not be a subordinate of the decision-maker. 49 Fed. Reg. 12215, 12229-30 (March 29, 1984); 24 C.F.R. § 982.555(e)(4)(i). Forcing PHA to be perpetually bound to a requirement rejected by HUD as undesirable not only infringes PHA's authority, but conflicts with HUD's policy decision.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ALAN C. KESSLER *
SUSAN J. FRENCH
VIRGINIA LYNN HOGBEN
WOLF, BLOCK, SCHORR AND
SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
(215) 977-2000

Counsel for Petitioner
Philadelphia Housing Authority

* Counsel of Record

May 11, 2007

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5317

VANESSA HENDERSON, on behalf of herself and all other persons similarly situated,
Appellant,

v.

ANTHONY MORRONE, individually and as Director of the Section 8 Program of the Philadelphia Authority; THOMAS J. KELLY, JR., individually and as Executive Director of the Philadelphia Housing Authority; THOMAS MCINTOSH, individually and as Chairman of the Board of Directors of the Philadelphia Housing Authority; HARRY SEWELL; HERMINE HART; CARMELITA THILL; DANTE MATTIONI, Individually and as members of the Board of Directors of the Philadelphia Housing Authority; PHILADELPHIA HOUSING AUTHORITY.

Vanessa Henderson and the certified class whom she represents,
Appellants.

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil No. 79-cv-04190)
District Judge: Honorable Clifford Scott Green
Submitted Under Third Circuit LAR 34.1(a)
Wednesday, December 13, 2006

Before FISHER, CHAGARES and GREENBERG, *Circuit Judges*.

(Filed January 25, 2007)

OPINION OF THE COURT

CHAGARES, *Circuit Judge.*

Appellant Vanessa Henderson, on behalf of herself and others similarly situated, appeals from an order granting the Philadelphia Housing Authority's ("PHA's") motion to vacate a consent decree. The District Court determined that vacatur was proper because the "purpose of the consent decree ha[d] been satisfied." Because we disagree with the District Court's construction of the decree, we will reverse and remand.

I.

In 1979, Vanessa Henderson was a low-income tenant receiving a rent subsidy from the PHA as part of the federal Section 8 assistance program.[1] In October of that year, the PHA sent Henderson a letter stating that, effective immediately, it was terminating her housing-assistance payments. The letter asserted that Henderson had misrepresented her family income and composition. Henderson responded by filing a class-action complaint in the United States District Court for the Eastern District of Pennsylvania. She contended that the PHA's failure to provide pretermination notice and an opportunity to be heard deprived her (and others similarly situated) of the process they were constitutionally due. *See* U.S. Const. amend. XIV, § 1.

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[1] "The federal section 8 rental assistance program was established under the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, and provides rent subsidies for low- and moderate-income participants so that they can afford to lease privately owned housing units." *Turner v. Crawford Square Apartments III, L.P.*, 449 F.3d 542, 544 n. 4 (3d Cir.2006).

Protracted settlement negotiations followed. By July 1982, the parties still had not reached an agreement, and the case remained pending in the District Court. Then, on July 26, the U.S. Department of Housing and Urban Development ("HUD") released proposed regulations dealing with pretermination process for recipients of Section 8 assistance. *See Section 8 Housing Assistance Payments Programs-Existing Housing*, 47 Fed.Reg. 32169 (July 26, 1982). The notice and hearing requirements described in the proposed regulations were substantially similar to those sought by Henderson's complaint.

Five months later, with the proposed regulations still pending, the parties filed a settlement stipulation in the District Court. The introductory portion of the agreement stated that plaintiffs had brought suit to challenge "the defendants' failure to provide [them] . . . with notice and an opportunity to be heard prior to the termination" of Section 8 assistance. Appendix ("App.") 17. The PHA, for its part, denied any deprivation of the plaintiffs' rights, but it agreed to the stipulation "in the interest of avoiding litigation." App. 18.

The stipulation stated that the PHA could terminate benefits only for good cause, and it provided for 30-days advance written notice of the termination. The notice had to inform the tenant of the reasons for the PHA's decision, the tenant's right to request an informal hearing within 10 days, and the tenant's right to be represented by counsel at the hearing. Upon receipt of a hearing request, the PHA had to provide the tenant with a written explanation of the hearing procedures. The tenant also had the right to inspect and copy all relevant PHA documents. At the hearing itself, the tenant could examine evidence, question adverse witnesses, and present testimony in her favor. While the hearing officer could be a PHA employee, the employee could not "be involved in the day to day administration of the [Section 8] program." App. 20. Following the hearing, the hearing officer was

required to render a written decision stating "the legal and evidentiary" basis for the determination. App. 19. Tenants would have 30 days to appeal from an adverse ruling.

At the time of the agreement, the parties obviously were aware of the looming possibility that the proposed HUD regulations would become final regulations. Paragraph 13 of the stipulation explicitly addressed that contingency:

> Should [HUD] promulgate regulations which require PHA to perform acts which are inconsistent with this Stipulation or which prohibit PHA from performing acts consistent with this Stipulation, such regulations shall govern. In the event that such regulations are promulgated, either party shall file an appropriate petition to modify this decree. This provision shall not be construed as a waiver of either party's right to challenge the validity of such regulations in an appropriate forum.

App. 21.

The District Court approved the stipulation in April of 1983 and entered it as an enforceable order of the court ("the consent decree").

The next year, HUD's proposed regulations (with some revisions) became final regulations. *See Section 8 Housing Assistance Payments Program; Existing Housing*, 49 Fed.Reg. 12215 (March 29, 1984).[2] The HUD regulations are in many ways identical to the protections provided by the consent decree. Housing authorities must provide tenants with notice of the reason for the proposed termination, notice of the right to an informal hearing, and notice of the deadline for requesting a hearing. *See* 24 C.F.R. § 982.555(c)(2)(A). Tenants also have rights to discovery, to legal representation at their own expense, and to present evidence and question witnesses at

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[2] From time to time, HUD has amended these regulations. *See, e.g.*, 24 C.F.R. § 982.555(e)(2) (providing limited rights to prehearing discovery).

their hearings. *See* 24 C.F.R. §§ 982.555(e)(2)(i), (e)(3), (e)(5). The hearing officer must be uninvolved in the decision under review, and must state the reasons for the decision. *See* 24 C.F.R. §§ 982.555 (e)(4), (e)(6).

But despite these broad similarities, there are some differences. First, while the consent decree requires 30-days notice prior to termination, the regulations do not set out a specific number of days. *See* 24 C.F.R. § 982.555(c)(2). Second, although both the decree and the regulations provide a right to counsel at the tenant's own expense, only the decree requires that notice of this right be provided in the initial notice of intent to terminate benefits. Third, the decree mandates at least 10-days notice of the hearing date, while the regulations leave the amount of notice to the housing authority's discretion. Fourth, only the decree requires the PHA, upon receipt of a hearing request, to "give the tenant a written explanation of the hearing procedure." Fifth, the consent decree requires hearing officers to "state the legal and evidentiary grounds for the decision." The regulations, on the other hand, require only a brief statement of "the reasons for the decision." 24 C.F.R. § 982.555(e)(6). Sixth, the consent decree states that persons "involved in the day to day administration of the [Section 8] program" may not be hearing officers, but the HUD regulations are not so broad. A person involved in day-to-day administration (or anyone else) can serve as a hearing officer under the regulations so long as he or she is not the "person who made or approved the decision under review or a subordinate of this person." 24 C.F.R. § 982.555(e)(4)(i). And seventh, the decree requires notice of a right to appeal within 30 days, and allows tenants to "petition for clarification" of a "vague or ambiguous decision." The regulations contain no such rights.

After HUD issued its final regulations in March of 1984, neither party attempted to modify the decree, no one ever brought contempt or enforcement proceedings, and it appears

that the PHA continued to perform its obligations under the decree. In fact, for 21 years not a single docket entry was added in the District Court. Then, like a bolt out of the blue, the PHA moved to vacate the consent decree in November of 2004 "based upon significant changes in the law." App. 25. The "significant changes" it relied on were the 1984 HUD regulations.

After hearing oral argument, the District Court vacated the decree. This appeal followed.

II.

Generally speaking, we review an order modifying a consent decree pursuant to Fed.R.Civ.P. 60(b) for abuse of discretion. *See Holland v. N.J. Dep't of Corr.*, 246 F.3d 267, 281 (3d Cir.2001). Nonetheless, to the extent the District Court's order turned on its construction of the decree, we exercise plenary review. *Id.* at 277 ("This Court . . . has held many times that a district court's construction and interpretation of a consent decree is subject to straightforward plenary or de novo review."). If the District Court misconstrued the decree, its legal error necessarily constitutes an abuse of discretion. *See Coltec Industries, Inc. v. Hobgood*, 280 F.3d 262, 269 n. 8 (3d Cir.2002).

A consent decree entered on a "stipulation of the parties has the characteristics of a contract, [and] contract principles govern its construction." *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233, 238 (3d Cir.2005). "One of these principles is that an unambiguous agreement should be enforced according to its terms." *Id.*

Here, the District Court's sole basis for vacating the consent decree was its determination that the decree's "purpose ha[d] been satisfied." Specifically, the court construed Paragraph 13 to establish that the parties intended the decree as no more than a temporary stopgap to "provide due process to families receiving benefits under section 8 housing until HUD regulations were promulgated." Since HUD had indeed prom-

ulgated regulations in 1984, the agreement's purpose had been fulfilled and vacatur was appropriate.

We cannot agree with that construction of the consent decree. If the parties had intended for their bargain to become inoperative once HUD promulgated final regulations, they certainly could have said so. But as it stands, Paragraph 13 recognizes the possibility of final HUD regulations, and proceeds to state only two limited situations in which they "shall govern": (1) if they "require PHA to perform acts which are inconsistent with" the stipulation, and (2) if they "prohibit PHA from performing acts consistent with" the stipulation. App. 21. The next sentence reads: "In the event that *such* regulations are promulgated, either party shall file an appropriate petition to modify this decree." *Id.* (emphasis added). The phrase "such regulations" plainly refers back to the two types of regulations described in the previous sentence. By stating these two limited situations in which the HUD regulations would "govern," the agreement expresses the parties' intent to be governed by their bargain with respect to any other differences between the two. *Cf. Plumbers & Steamfitters Local 150 Pension Fund v. Vertex Constr. Co.*, 932 F.2d 1443, 1449 (11th Cir.1991) ("The doctrine of *expressio unius est exclusio alterius* instructs that when certain matters are mentioned in a contract, other similar matters not mentioned were intended to be excluded.").

The PHA attempts to avoid this straightforward reading of Paragraph 13 by relying on this statement from the consent decree's introductory paragraph: "Plaintiffs have commenced a civil class action seeking [relief for] the defendants' failure to provide tenants under the Section 8 Housing Assistance [Program] with notice and an opportunity to be heard prior to the termination of the tenants from participation in the Program." App. 17. The PHA reads this sentence to "clearly indicate[ ] that the purpose of the Consent Decree was to fill the void of no regulations and no notice and hearing procedures, not to obtain particular terms and procedures for the

notice and hearing." PHA Brief at 30-31. We disagree for two reasons. First, the quoted sentence states the plaintiffs' purpose for "commenc[ing] a class action"; it does not state their purpose for entering into a stipulation. Second, this generalized statement of purpose does not purport to nullify the plain and specific terms of Paragraph 13.

We therefore construe the consent decree to mean what it says: HUD's final regulations trump the parties' bargain only when they "require PHA to perform acts which are inconsistent with" the stipulation, and when they "prohibit PHA from performing acts consistent with" the stipulation. App. 21; *see McDowell*, 423 F.3d at 238. Because the consent decree simply provides greater and more specific protections for tenants, the HUD regulations do neither of these things. For example, the HUD regulations do not require the PHA to inform tenants of their right to counsel in the initial notice of intent to terminate benefits, but they certainly do not forbid it. The HUD regulations may not mandate that the PHA provide "a written explanation of the hearing procedure," but they do not prevent the PHA from doing so. The regulations require only a brief statement of "the reasons for the decision," 24 C.F.R. § 982.555(e)(6), but they do not prohibit the hearing officer from providing a more detailed explanation of the decision's "legal and evidentiary" basis. And although the regulations do not mandate notice of rights to appeal or to "petition for clarification," the PHA is free to do so consistent with the regulations. In short, nothing in the HUD regulations requires an act inconsistent with the consent decree, and nothing in the HUD regulations forbids an act consistent with the consent decree. Accordingly, it was error to conclude that the promulgation of HUD regulations satisfied the purpose of the agreement.

III.

Independent of the District Court's reasons, the PHA also argues that vacatur is appropriate because "it is no longer

equitable that the judgment should have prospective application." Fed.R.Civ.P. 60(b). The Supreme Court has held that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992). This burden can be met by "showing a significant change either in factual conditions or in law." *Id.* at 384. "Ordinarily, . . . modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *Id.* at 385; *see also Building & Construction Trades Council of Philadelphia v. NLRB*, 64 F.3d 880, 888 (3d Cir.1995) ("Central to the court's consideration will be whether the modification is sought because changed conditions unforeseen by the parties have made compliance substantially more onerous or have made the decree unworkable.")

The PHA argues that HUD's final regulations constituted a significant change in the law. We have no doubt that they were, but the fact remains that the parties "actually . . . anticipated" the promulgation of HUD regulations at the time of their agreement. *See Rufo*, 502 U.S. at 383. Their agreement expressly states the two circumstances in which the HUD regulations control, and (as we have explained) neither one is applicable.[3] In light of the consent decree's

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[3] Notwithstanding the parties' anticipation of final HUD regulations, the PHA views our dictum in *Brown v. Philadelphia Housing Authority*, 350 F.3d 338 (3d Cir.2003), as controlling in this case. In Brown, we held that "the case was moot and that we lacked subject matter jurisdiction," but nonetheless offered "some guidance . . . to the bench and bar pertaining to the test for determining when a court ordered decree should be set aside as having lost its utility." *Id.* at 448 n. 6. We stated that "there need not be a conflict" between a consent decree and a subsequent change in the law. Rather, "a significant change with no attendant conflict constitutes sufficient grounds for vacatur." *Id.* Our dictum in *Brown* was quite true, but quite inapposite here. In *Brown*, the parties' agreement had not explicitly anticipated the change in law, nor did it provide for the limited

own terms, the most equitable result is to hold the parties to their bargain.

IV.

We will reverse the District Court's order and remand for further proceedings consistent with this opinion.

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situations in which the contemplated change would govern. Moreover, in Brown the relevant changes in law "gave broader and more comprehensive protection to PHA residents than had been available under the Consent Decree," and as a result "the Consent Decree no longer had force or utility." *Id.* The Henderson decree, on the other hand, provides greater protections than the HUD regulations and remains useful for tenants on Section 8 assistance. As a result, *Brown* provides no help to the PHA.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed NOV. 8, 2005]

Civil Action No. 79-4190

VANESSA HENDERSON, on behalf of herself and all other persons similarly situated

Plaintiff,

v.

Anthony Morrone et al.,

Defendant.

ORDER

Presently pending is Philadelphia Housing Authority's (PHA) Motion to Vacate Consent Decree and Plaintiff's Answer to Defendant PHA's Motion to Vacate Consent Decree. AND NOW this 7th day of November 2005, upon consideration of parties' pleadings and memoranda, IT IS HEREBY ORDERED that Defendant's Motion to Vacate Consent Decree will be GRANTED.

The consent decree states, in paragraph thirteen (13), that in the event "the United States Department of Housing and Urban Development (HUD) promulgate regulations which require PHA to perform acts which are inconsistent with [the] Stipulation or which prohibit PHA from performing acts consistent with this Stipulation, such regulations shall govern." In the present case, unchallenged regulations have been promulgated that provide for notice, hearings and due process safeguards for Section 8 participants. These regulations are consistent with the consent decree designed by the parties to provide due process to Section 8 participants. As required by

the consent decree, the regulations have not been challenged and appear to govern the process.

In the event the purpose of a consent decree has been satisfied, the consent decree may be vacated.[1] Paragraph 13, of the consent decree, makes clear that the purpose of the consent decree was to provide due process to families receiving benefits under section 8 housing until HUD regulations were promulgated. Since the present regulations provide the process for families living in section 8 housing, the purpose of the consent decree has been satisfied. Accordingly, the consent decree will be vacated on motion of defendant PHA.

AND NOW, this 7th day of November 2005 IT IS HEREBY ORDERED that PHA's Motion to Vacate the Consent Decree is GRANTED.

BY THE COURT:

/s/ Clifford Scott Green
CLIFFORD SCOTT GREEN, S.J.

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[1] *Brown v. Philadelphia Housing Authority*, 237 F. Supp.2d 567, 574 (E.D. Pa., 2002) citing *Hodge v. Department of Housing & Urban Development*, 862 F.2d 859 (11th Cir. 1989).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5317

VANESSA HENDERSON, on behalf of herself and all other persons similarly situated

v.

ANTHONY MORRONE, individually and as Director of the Section 8 Program of the Philadelphia Authority; THOMAS J. KELLY, JR., individually and as Executive Director of the Philadelphia Housing Authority; THOMAS MCINTOSH, individually and as Chairman of the Board of Directors of the Philadelphia Housing Authority; HARRY SEWELL; HERMINE HART; CARMELITA THILL; DANTE MATTIONI, Individually and as members of the Board of Directors of the Philadelphia Housing Authority; PHILADELPHIA HOUSING AUTHORITY

Vanessa Henderson and the certified class whom she represents,

Appellants.

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, and JORDAN *Circuit Judges*, and GREENBERG, *Senior Circuit Judge*[*]

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who par-

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[*] As to panel rehearing only.

ticipated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Michael A. Chagares
Circuit Judge

DATED: February 22, 2007

DMM/cc: Paul A. Brooks, Esq.
Michael Donahue, Esq.
George D. Gould, Esq.
Susan J. French, Esq.
Virginia L. Hogben, Esq.
Alan C. Kessler, Esq.

APPENDIX D

§ 982.555 Informal hearing for participant.

(a) *When hearing is required.*—(1) A PHA must give a participant family an opportunity for an informal hearing to consider whether the following PHA decisions relating to the individual circumstances of a participant family are in accordance with the law, HUD regulations and PHA policies:

(i) A determination of the family's annual or adjusted income, and the use of such income to compute the housing assistance payment.

(ii) A determination of the appropriate utility allowance (if any) for tenant-paid utilities from the PHA utility allowance schedule.

(iii) A determination of the family unit size under the PHA subsidy standards.

(iv) A determination that a certificate program family is residing in a unit with a larger number of bedrooms than appropriate for the family unit size under the PHA subsidy standards, or the PHA determination to deny the family's request for an exception from the standards.

(v) A determination to terminate assistance for a participant family because of the family's action or failure to act (see § 982.552).

(vi) A determination to terminate assistance because the participant family has been absent from the assisted unit for longer than the maximum period permitted under PHA policy and HUD rules.

(2) In the cases described in paragraphs (a)(1)(iv), (v) and (vi) of this section, the PHA must give the opportunity for an informal hearing before the PHA terminates housing assistance payments for the family under an outstanding HAP contract.

(b) *When hearing is not required.* The PHA is not required to provide a participant family an opportunity for an informal hearing for any of the following:

(1) Discretionary administrative determinations by the PHA.

(2) General policy issues or class grievances.

(3) Establishment of the PHA schedule of utility allowances for families in the program.

(4) A PHA determination not to approve an extension or suspension of a voucher term.

(5) A PHA determination not to approve a unit or tenancy.

(6) A PHA determination that an assisted unit is not in compliance with HQS. (However, the PHA must provide the opportunity for an informal hearing for a decision to terminate assistance for a breach of the HQS caused by the family as described in § 982.551(c).)

(7) A PHA determination that the unit is not in accordance with HQS because of the family size.

(8) A determination by the PHA to exercise or not to exercise any right or remedy against the owner under a HAP contract.

(c) *Notice to family.* (1) In the cases described in paragraphs (a)(1)(i), (ii) and (iii) of this section, the PHA must notify the family that the family may ask for an explanation of the basis of the PHA determination, and that if the family does not agree with the determination, the family may request an informal hearing on the decision.

(2) In the cases described in paragraphs (a)(1)(iv), (v) and (vi) of this section, the PHA must give the family prompt written notice that the family may request a hearing. The notice must:

(i) Contain a brief statement of reasons for the decision,

(ii) State that if the family does not agree with the decision, the family may request an informal hearing on the decision, and

(iii) State the deadline for the family to request an informal hearing.

(d) *Expeditious hearing process.* Where a hearing for a participant family is required under this section, the PHA must proceed with the hearing in a reasonably expeditious manner upon the request of the family.

(e) *Hearing procedures*—(1) *Administrative plan.* The administrative plan must state the PHA procedures for conducting informal hearings for participants.

(2) *Discovery*—(i) *By family.* The family must be given the opportunity to examine before the PHA hearing any PHA documents that are directly relevant to the hearing. The family must be allowed to copy any such document at the family's expense. If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing.

(ii) *By PHA.* The PHA hearing procedures may provide that the PHA must be given the opportunity to examine at PHA offices before the PHA hearing any family documents that are directly relevant to the hearing. The PHA must be allowed to copy any such document at the PHA's expense. If the family does not make the document available for examination on request of the PHA, the family may not rely on the document at the hearing.

(iii) *Documents.* The term "documents" includes records and regulations.

(3) *Representation of family.* At its own expense, the family may be represented by a lawyer or other representative.

(4) *Hearing officer: Appointment and authority.* (i) The hearing may be conducted by any person or persons designated by the PHA, other than a person who made or approved the decision under review or a subordinate of this person.

(ii) The person who conducts the hearing may regulate the conduct of the hearing in accordance with the PHA hearing procedures.

(5) *Evidence.* The PHA and the family must be given the opportunity to present evidence, and may question any witnesses. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.

(6) *Issuance of decision.* The person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. A copy of the hearing decision shall be furnished promptly to the family.

(f) *Effect of decision.* The PHA is not bound by a hearing decision:

(1) Concerning a matter for which the PHA is not required to provide an opportunity for an informal hearing under this section, or that otherwise exceeds the authority of the person conducting the hearing under the PHA hearing procedures.

(2) Contrary to HUD regulations or requirements, or otherwise contrary to federal, State, or local law.

(3) If the PHA determines that it is not bound by a hearing decision, the PHA must promptly notify the family of the determination, and of the reasons for the determination.

(g) *Restrictions on assistance to noncitizens.* The informal hearing provisions for the denial of assistance on the basis of ineligible immigration status are contained in 24 CFR part 5.

(Approved by the Office of Management and Budget under control number 2577-0169)

[60 FR 45661, Sept. 1, 1995; 61 FR 13627, March 27, 1996; 64 FR 26650, May 14, 1999; 64 FR 43613, Aug. 11, 1999; 64 FR 56911, Oct. 21, 1999; 65 FR 16823, March 30, 2000]

	YR	NUMBER	MO	DAY	YEAR	J	N/S	O			23	$ OTHER	NUMBER	DEM	YR	NUMBER
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313	2	79	4190	11	19	79	3	440	1			1		CG 1333		79	4190

PLAINTIFFS | DEFENDANTS

HENDERSON, Vanessa
on behalf of herself and all
other persons similarly situated

vs

MORRONE, Anthony
individually and as Director
of the Section 8 Program of
the Philadelphia Authority
KELLY, Thomas J. Jr.
individually and as Executive
Director of the Philadelphia
Housing Authority,
McINTOSH, Thomas
individually and as Chairman of
the Board of Directors of the
Philadelphia Housing Authority
SEWELL, Harry
HART, Hermine
THILL, Carmelita
MATTIONI, Dante
Individually and as members of th
Board of Directors of the Phila-
delphia Housing Authority
PHILADELPHIA HOUSING AUTHORITY

CAUSE

C/R Action for deprivation of rights to due
process

(RELATED TO C.A. 79-1702 CG)

ATTORNEYS

FOR PLAINTIFF
George D Gould, Esq (15)
David A Searles, Esq
Joyce S Wilkinson, Esq
COMMUNITY LEGAL SERVICES, INC
Sylvania House
Locust and Juniper Streets
Phila , Penna 19107

Paul A. Brooks, Esq.
Community Legal Services, Inc.
1424 Chestnut Street, 5th Floor
Philadelphia, PA 19102
ph 215.981.3700
fx. 215 981.0434

(#7) James Hickey, Esq.
The Philadelphia Housing Authorit
2012-18 Chestnut St , Phila Pa 191
FOR- The Phila Housing Authority
Fincourt B Shelton, Esq (15)

SUSAN FRENCH
1650 ARCH STREET, 22nd FLOOR
WOLF BLOCK
PHILADELPHIA, PA 19103

Microfiche

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS 5	
				JS 6	11/8/79

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/78)

20a
APPENDIX E

BEST AVAILABLE COPY

DATE	NR.	PROCEEDINGS 79 - 4190
~~1979~~		
1 NOV	19	PLFF'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS WITH AFFIDAVIT IN SUPPORT THEREOF, FILED
(1) "	19	ORDER AUTHORIZING PLFF TO FILE THE COMPLAINT IN THIS ACTION IN FORMA PAUPERIS ETC., FILED CG 11/20/79 ENTERED & COPIES MAILED
(1) "	19	Complaint filed
"	19	Summons Exit (USM 285 Not Attached)
2 "	19	MOTION AND ORDER SPECIALLY APPOINTING CHARLES ISELEY & MELVIN GOWANS TO SERVE THE COMPLAINT & TRO UPON ALL DEFTS, FILED 11/20/79 ENTERED/SUMMONS MAILED TO COUNSEL
3 "	19	PLFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, AFFIDAVIT AND MEMORANDUM IN SUPPORT, FILED
(3) "	19	ORDER THAT DEFTS ARE ENJOINED FROM TERMINATING PLFF FROM PARTICIPATION IN THE SECTION 8 HOUSING ASSISTANCE PAYMENT PROGRAM AND ARE ORDERED TO ISSUE PLFF A CERTIFICATE OF FAMILY PARTICIPATION AND TO CONTINUE TO MAKE HOUSING ASSISTANCE PAYMENTS ON PLFF'S BEHALF CONSONANT WITH THE STATUTORY AND REGULATORY REQUIREMENTS OF THE SECTION 8 PROGRAM AND SCHEDULING 12/4/79 AT 9:15 A.M. IN COURTROOM 15B FOR A HEARING ON PLFF'S MOTION FOR A PRELIMINARY INJUNCTION, FILED 11/20/79 ENTERED & COPIES MAILED
4 "	21	Plff's request for production of documents, filed
5 "	21	Plff's notice of taking the deposition of the most appropriate employee of the Phila. Housing Authority, filed
6 "	30	PLFF'S MOTION FOR EXPEDITED DISCOVERY, MEMORANDUM IN SUPPORT AND CERTIFICATION, FILED
7. DEC.	11	Letter dd. 11/29/79 from James Hickey,Esq.of The Phila.Housing Authority to Judge Green, advising the Court that as a result of the facts presented by V.Henderson(plf on 11/27/79 when she responded to her termination, The Philadelphia Housing Authorit has decided to issue a Certificate of Family Participation & to restore all benefit to Vanessa Henderson,etc.,filed.
8 "	20	Report of Pretrial Conference Green, J., filed
1980		
9 FEB	14	STIPULATION AND ORDER EXTENDING TIME TO 3/12/80 FOR PLFF TO FILE THE MOTION FOR DETERMINATION OF CLASS ACTION, FILED 2/14/80 ENTERED & COPIES MAILED
10 MAR	26	Letter dated 3/14/80 to Judge Green from David A. Searles, Esq. advising the Court on the present status of the case etc., filed
11 Apr	21	Letter dtd. 4/15/80 to Judge Green from James Hickey, Esq. re: Status of Settlement Negotiations, filed
(1982)		
12 OCT	20	Copy of Clerk's Notice of Dismissal pursuant to Local Rule 23(a), filed 10/20/82 Notice mailed to counsel
13 Nov.	26	STIPULATION AND ORDER THAT THIS ACTION IS CERTIFIED AS A CLASS ACTION ON BEHALF OF ALL PERSON WHO ARE PRESENTLY OR MAY IN THE FUTURE BE TENANTS UNDER SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM-EXISTING HOUSING, ADMINISTERED BY THE PHILA. HOUSING AUTHORITY, FILED. CG 11-26-82 Entered and copies mailed.
14 "	26	STIPULATION AND ORDER THAT THE STIPULATION SUBMITTED TO THE COURT AND ENTERED INTO BY THE PARTIES IN FULL SETTLEMENT OF THIS MATTER IS APPROVED, PLFFS AND DEFTS AND THEIR SUCCESSORS SHALL ABIDE BY AND IMPLEMENT THE PROCEDURES AND AGREEMENTS WHICH ARE SET FORTH IN THE STIPULATION, ALL PARTIES SHALL BEAR THEIR OWN COSTS, EXPENSES AND ATTORNEY FEES, FILED. CG 11-26-82 Entered and copies mailed.

CONT.

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DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 79-4190
VANESSA HENDERSON	ANTHONY MARRONE, ET AL	PAGE ___ OF ___ PAGE

DATE	NR.	PROCEEDINGS
1983		
15 Mar.	24	JOINT MOTION FOR THE FORM OF NOTICE OF PROPOSED SETTLEMENT, FILED.
(15)"	29	ORDER DATED 3/28/83 THAT THE FORM OF NOTICE AND THE METHOD OF GIVING NOTICE PROPOSED BY THE PARTIES IN THEIR JOINT MOTION ARE APPROVED, FILED. 3/30/83 entered & copies mailed
(15) Apr.	4	ORDER THAT THE COURT WILL HOLD A HEARING ON APRIL 27, 1983 AT WHICH SECTION 8 TENANTS OR APPLICANTS MAY PRESENT OBJECTIONS TO THE SETTLEMENT, FILE 4/5/83 Entered and copies mailed.
16 "	27	Argued Sur: Hearing of 4/27/83; re: Section 8 tenants may present objections to the Settlement; no Objections-Court signs Consent Decree, filed.
17 "	27	ORDER THAT THE STIPULATION SUBMITTED TO THE COURT AND ENTERED INTO BY THE PARTIES IN FULL SETTLEMENT OF THIS MATTER IS HEREBY APPROVED AND ENTERED AS THE ORDER OF THIS COURT; IT IS FURTHER ORDERED THAT PLFFS AND DEFTS AND THEIR SUCCESSORS SHALL ABIDE BY AND IMPLEMENT THE PROCEDURES AND AGREEMENT WHICH ARE SET FORTH IN SAID STIPULATION AND SPECIFICALLY INCORPORATED BY REFERENCE HEREIN, ETC. FILED. 4/27/83 Entered and Copies mailed.
18 "	27	ORDER THAT THE CONSENT DECREE ENTERED ON NOVEMBER 26, 1982 IN THIS MATTER IS HEREBY VACATED, FILED. 4/27/83 Entered and Copies mailed.
19 May	2	Certification of Service of Fincourt B. Shelton, Esq. re: "Copy of Notice of Settlement of Class Action case between Plff and Deft. to all Section 8 Housing Assistance Payments recipients by Mail on April 15, 1983" filed. Microfiche
2004		
20 Nov.	9	DEFENDANT PHILADELPHIA HOUSING AUTHORITY'S MOTION TO VACATE CONSENT DECREE, MEMORANDUM, CERTIFICATE OF SERVICE. (fdc)
21 " "	" "	Appendix of Exhibits of Defendant Philadelphia Housing Authority in Support of Motion to Vacate Consent Decree, Certificate of Service.
22 Dec.	2	STIPULATION AND ORDER THAT PLAINTIFFS SHALL HAVE AN EXTENSION OF TIME UNTIL AND INCLUDING JANUARY 3, 2005 TO ANSWER, PLEAD OR OTHERWISE MOVE IN RESPONSE TO DEFENDANTS' MOTION TO VACATE THE CONSENT DECREE. SIGNED BY HON. GREEN. ENTERED AND COPIES MAILED.12,
23 " "	22	Entry of Appearance of Paul A. Brooks, Esq. on behalf of Plaintiff Certificate of Service. (fdc)
23 Dec	27	STIPULATION AND ORDER THAT PLAINTIFFS SHALL HAVE AN EXTENSION OF TIME UNTIL AND INCLUDING 1/14/05 WITHIN WHICH TO ANSWER, PLEAD OR OTHERWISE FILE A RESPONSE TO PHA'S MOTION TO VACATE CONSENT DECREE. 12/28/04 ENTERED AND COPIES MAILED.
2005		
25 Jan	14	Plaintiffs' Answer to Defendant PHA'S Motion to Vacate Consent Decree, Certificate of Service. (fdc)
26 Jan	31	Reply Brief of Defendant Philadelphia Housing Authority in Support of its Motion to Vacate Consent Decree, Certificate of Service. (f
27 Feb	14	ORDER THAT A CONFERENCE WILL BE HELD IN THE ABOVE CAPTIONED CASE ON 2/17/05 AT 11:00 AM IN CHAMBERS. ENTERED AND COPIES MAILED 2/14, SIGNED BY HON. GREEN. (fdc)'
28 " "	18	Report of Conference on 2/17/05 before Judge Green.
29 Aug.	26	ORDER THAT AN ORAL ARGUMENT ON THE MOTION TO VACATE THE CONSENT DECREE WILL BE HELD 9/15/05 AT 11:00 AM. SIGNED BY HON. GREEN ENTERED AND COPIES MAILED 8/26/05. (fdc)

CIVIL DOCKET CONTINUATION SHEET

DEFENDANT

DOCKET NO. _____

PAGE ___ OF ___ PAGES

		PROCEEDINGS
		Minute Entry. Hearing Re: Motion to Vacate on 9/15/05 at 11:00 am. Time in court: 1hr. and 10 mins. before Judge Green. (fdc)
		Transcript. Hearing before Judge Green on 9/15/05. (fdc)
	8	ORDER THAT DEFENDANT'S MOTION TO VACATE THE CONSENT DECREE IS GRANTED. SIGNED BY HON. GREEN 11/8/05 ENTERED AND COPIES MAILED. (fdc)
	5	Plaintiffs' Notice of Appeal, Certificate of Service. (Re: Order of 11/8/05)
		Clerk's Notice to USCA.
" "	9	USCA Notice of Docketing ROA Appeals Docket No. 05-5317. (fdc)
2006		
Jan.	10	Notice of Appeal Filing Fee $255.00 Receipt# 924687. (fdc)

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 79-
CLASS ACTION

VANESSA HENDERSON, on behalf of herself and all other persons similarly situated,
Plaintiff,

vs.

ANTHONY MORRONE, individually and as Director of the Section 8 Program of the Philadelphia Housing Authority, THOMAS J. KELLY, JR., individually and as Executive Director of the Philadelphia Housing Authority, THOMAS MCINTOSH, individually Class Action and as Chairman of the Board of Directors of the Philadelphia Housing Authority, HARRY SEWELL, HERMINE HART, CARMELITA THILL, DANTE MATTIONI, individually and as members of the Board of Directors of the Philadelphia Housing Authority, PHILADELPHIA HOUSING AUTHORITY.
Defendants.

COMPLAINT

I. *PRELIMINARY STATEMENT*

1. This is a class action for injunctive and declaratory relief as well as damages brought by a low-income tenant, on behalf of herself and all others similarly situated, who challenges the defendants' policy and practice of terminating tenants' housing subsidies under Section 201(a) (8) of the Housing and Community Development Act of 1974, 42 U.S.C. §1437f, (Section 8), without affording tenants notice and an opportunity to be heard prior to the termination.

2. Plaintiff brings this action pursuant to 42 U.S.C. §1983 alleging that the actions of the defendants constitute violations of the due process clause of the Fifth and Fourteenth Amendments and the Housing and Community Development Act of 1974.

II. *JURISDICTION*

3. Jurisdiction is conferred upon this Court by 28 U.S.C. §1343(3) and (4) as this is an action authorized by 42 U.S.C. §1983 to redress the deprivation, under color of state law, of rights privileges or immunities secured by the Constitution and the laws of the United States; by 28 U.S.C. §1331 as this is an action arising under the Constitution and laws of the United States wherein the matter in controversy exceeds the sum of ten thousand dollars ($10,000), exclusive of interest and costs; by 28 U.S.C. §1337 as this is an action arising under an Act of Congress regulating interstate commerce; and by 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedures authorizing declaratory and other necessary relief.

III. *PARTIES*

4. Plaintiff Vanessa Henderson is a low-income tenant residing at 7441 Limekiln Pike, Apt. A-5, Philadelphia, Pennsylvania.

5. Defendant Philadelphia Housing Authority (hereinafter "PHA") is a public body, corporate and politic, exercising public powers of the Commonwealth of Pennsylvania as an agency thereof, existing under the laws of the Commonwealth of Pennsylvania, Act of May 28, 1937, P.L. 955 *et seq.*, 35 P.S. §1541 *et seq.*, with the right to sue and be sued. PHA's main offices are located at 2012 Chestnut Street, Philadelphia, PA. PHA administers the distribution of federal rental assistance payments under the Section 8 Program; its Section 8 Program offices are located at 1216 Walnut Street, Philadelphia, PA.

6. Defendant Thomas J. Kelly, Jr. is the Executive Director of PHA and is responsible both for administering the daily operations of PHA and for PHA's policies and practices in administering the Section 8 Program.

7. Defendant Anthony Morrone is the Director of the Section 8 Program and is responsible for administering the daily operations of the Section 8 Program.

8. Defendants Thomas McIntosh, Harry Sewell, Hermine Hart, Carmelita Thill and Dante Mattioni are the five members of the Board of Directors of PHA and, as such, are responsible for the formulation of PHA policy.

9. At all times relevant, defendants were acting under color of state law as agents, servants, and/or employees, as well as high officers, of the Philadelphia Housing Authority.

10. All defendants are sued in their individual as well as official capacity.

IV. *CLASS ACTION ALLEGATIONS*

11. Plaintiff Henderson seeks to maintain this action on her own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Civil Rules of Procedure. The plaintiff class is defined to include all persons who have been or will be terminated from the Section 8 Program without the benefit of adequate notice and opportunity for hearing.

12. The class is so numerous that joinder of all members is impractical. The number of class members is not presently known but may be discovered through documents in the possession of the defendants.

13. There are questions of law and fact common to the class, i.e., whether the defendants have terminated class members from participation in the Section 8 Program without adequate notice and opportunity for a hearing and whether that procedure is violative of the law.

14. The claims of the named plaintiff, i.e., that lack of notice and opportunity for a hearing prior to termination from participation in the Section 8 Program is violative of law, are typical of the claims of the class.

15. The named plaintiff will fairly and adequately protect the interest of the members of the class in that she promises vigorous and complete prosecution of this matter and her attorneys are experienced with litigation in federal courts concerning low-income housing.

16. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and declaratory relief with respect to the class as a whole.

V. *FACTUAL ALLEGATIONS*

17. The Section 8 Program is a federal housing program, adopted by Congress as part of the Housing and Community Development Act of 1974, 42 U.S.C. §1437f, under which the local public housing authority, by contract with the Department of Housing and Urban Development, makes rental payments directly to private landlords for the benefit of low-income people.

18. Under the Section 8 Program in Philadelphia, a family applies to PHA for participation. If the family meets the financial eligibility criteria, PHA issues a Certificate of Family Participation. Equipped with the Certificate, the family has the responsibility to find a private landlord willing to participate in the program.

19. Once PHA approves the lease, the tenant's share of the rent and utilities is fixed at 25% of their adjusted family income. PHA supplements the rent by making Housing Assistance Payments directly to the landlord out of funds received through its Annual Contribution Contract with HUD.

20. Plaintiff Henderson, a mother of two children aged 1 and 2, applied for and received a Certificate of Family Participation from PHA in December 1977.

21. On January 1, 1978, plaintiff signed a lease, which had been approved by PHA, with Robert Court Apartments to rent a two-bedroom apartment.

22. Plaintiff's sole source of income for herself and her two children is a monthly public assistance grant of $302.00.

23. The rental price for plaintiff's apartment is $227.00. Under the Section 8 Program, plaintiff contributed $42 towards the rent each month and paid her own electricity bill, which average $20 each month and PHA made monthly Housing Assistance Payments to Robert Court Apartments of $185.00.

24. Plaintiff has resided at Robert Court Apartments under the terms of the Section 8 Program from January 1, 1978, to the present.

25. On October 25, 1978, plaintiff received a letter from the Section 8 Program which stated that, effective immediately all Housing Assistance Payments made on her behalf had been terminated and, further, that she had been determined ineligible for further participation in the Section 8 Program. The letter is attached hereto and identified as Exhibit A.

26. Defendants' stated reason for the termination was that plaintiff misrepresented her family income and composition. Defendants' allegations was based on a letter from plaintiff's public assistance caseworker to PHA alleging that plaintiff's cousin resided with her and paid her rent. In fact, plaintiff's cousin only used the residence as a mailing address and has since stopped doing so. Had the plaintiff been provided with pre-termination notice and opportunity for a hearing, she would have been able to present evidence disproving the charge of misrepresentation of income.

27. The October 25, 1979, letter terminating plaintiff's participation in the Section 8 Program does not notify plaintiff of her right to challenge the termination.

28. Upon receipt of the October 25, 1979, letter, plaintiff Henderson immediately contacted PHA and was told by a PHA employee that the notice had been sent in error and to disregard it.

29. During the first week of. November, plaintiff Henderson was notified by the manager of Robert Court apartments that PHA had not made its Housing Assistance Payment to the landlord for November.

30. Plaintiff Henderson again contacted PHA and was told by a PHA employee that the October 25, letter terminating her benefits was not in error and that she had in fact been terminated from the program.

31. At no time was plaintiff Henderson informed of a procedure by which she could obtain an impartial evidentiary hearing prior to the termination of her participation in the Section 8 Program.

32. As a result of the defendants' action, plaintiff Henderson is unable to pay the monthly rental charge to her landlord and consequently fears that legal action will be taken against her for nonpayment of rent. She is being forced to vacate her apartment and to look for alternative housing in a very tight housing market.

33. Plaintiff Henderson had located another private landlord who was willing to lease her a dwelling under the Section 8 Program but, as a result of her termination by defendants, plaintiff was unable to accept the offer to lease.

34. This offer to lease has since been withdrawn and the other landlord refuses to further discuss renting to plaintiff until she has a Certificate.

35. As a result of defendants' actions, plaintiff is suffering and will continue to suffer immediate and irreparable harm in that she and her two children are being forced to vacate their home or be evicted therefrom because they are clearly unable to pay the $227 monthly rent and unable to secure affordable decent, safe and sanitary alternative housing. Plaintiff is also suffering extreme anxiety and fear for herself and her family over the loss of her Certificate of Family Participation in the Section 8 Program. Plaintiff has no adequate remedy at law.

36. Plaintiff alleges on information and belief that defendants have no adequate written procedures governing the termination of Certificate of Family Participation which comply with the requirements of 42 U.S.C. § 1437f and rules and regulations promulgated thereunder.

VI. *CAUSES OF ACTION*

FIRST CLAIM: DUE PROCESS

37. Plaintiff hereby incorporates by reference the foregoing paragraphs 1 through 36.

38. Under the Fifth and Fourteenth Amendments, rent subsidies under the Section 8 Program cannot be terminated arbitrarily or capriciously or in the absence of adequate procedural protection.

39. Defendants, acting under color of state law, have terminated plaintiff Henderson's participation in the Section 8 Program arbitrarily and capriciously, without providing her adequate notice and an opportunity for a prior hearing to challenge the termination.

40. Defendants' actions have violated the rights of plaintiff Henderson and the class she represents to due process of law.

SECOND CLAIM: STATUTORY

41. Plaintiff hereby incorporates by reference the foregoing paragraphs 1 through 36.

42. Defendants' actions, in terminating plaintiff and the members of her class from participation in the Section 8 Program without notice and an opportunity for a prior hearing to Challenge the termination, violate the Housing and Community Development Act of 1974, 42 U.S.C. §1437, and regulations promulgated thereunder.

VII. *PRAYER FOR RELIEF*

WHEREFORE, plaintiff Vanessa Henderson on behalf of herself and all others similarly situated, pray that this court enter relief as follows:

1. Assume jurisdiction of this case.
2. Certify this action to proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.
3. Grant a temporary restraining order and a preliminary injunction restraining the defendants, their agents and all persons acting in concert with them from revoking plaintiff Vanessa Henderson's Certificate of Family Participation in the Section 8 Program and from refusing to continue her Housing Subsidy Entitlements under that Program unless and until Ms. Henderson is provided with:
    a. A written notice detailing the reasons for the proposed revocation, the facts underlying those reasons, and the grounds believed by the defendants to constitute good cause for revocation of her Section 8 Certificate;
    b. An opportunity to contest those facts and reasons in a hearing before an impartial decision-making body and in which Ms. Henderson may be repre-

sented by counsel or other appropriate representative of her choice, and may present testimony and documentary evidence and may have access to all records of the defendants relating to her;

c. A written decision of the decision-making body with findings of facts based solely upon the hearing, conclusions as to whether good cause for revocation exists and the law supporting that conclusion.

d. The right to appeal the decision.

4. Issue a declaratory judgment, pursuant to Title 28 U.S.C. §§2201 and 2202, that the acts, omissions, practices, policies and procedures of defendants complained of herein violate plaintiff class members' rights as heretofore alleged.

5. Grant permanent injunctive relief on behalf of the plaintiff class prohibiting, enjoining and restraining the defendants, their agents, employees, successors in office and all persons acting in concert with them from revoking, terminating or otherwise denying to the class members the entitlements which they are receiving under the Section 8 Program, without affording class members those rights set out in Paragraph 3, subparts a, b, c and d above, and informing all class members of the basis for good cause Section 8 revocations.

6. Grant permanent injunctive relief on behalf of the plaintiff class requiring the defendants to give written notice to all members of the plaintiff class who have been terminated from participation in the Section 8 Program without a prior oral evidentiary hearing, and affording such persons an opportunity for such a hearing as set out in Paragraph 3, subparts a, b, c, and d above, and if they are found to have been improperly

terminated, affording such members of the class priority on recertification in the Section 8 Program.

7. Award plaintiff costs and reasonable attorneys' fees.
8. Such other relief as deemed appropriate by the Court.

/s/ David A. Searles
DAVID A. SEARLES
JOYCE S. WILKERSON
GEORGE D. GOULD
HAROLD R. BERK
COMMUNITY LEGAL SERVICES, INC.
Sylvania House
Juniper and Locust Streets
Philadelphia, PA 19107
Tele: (215) 893-5306

DATED: November 19, 1979

THE PHILADELPHIA HOUSING AUTHORITY

Section 8 Housing Program
Re-Examination Department
1216 Walnut Street
Phila., Pa. 19107

October 25, 1979

Ms. Venessa Henderson
7441 Limekiln Pike #A-5
Phila., Pa.
Case #4983

Dear Ms. Henderson:

As of date of this notification, the Housing Assistance Payments Contract, and all Housing Assistance Payments made on our behalf have been terminated. Also, you have been determined ineligible for further Section 8 Housing Assistance.

The reason for this action is due to your failure to comply with the obligations under Paragraph 7 of the Certificate of Family Participation.

The following are the reasons as to why you are in violation of the Certificate of Family Participation.

Misrepresentation of Family Income and Composition.

Therefore, effective immediately, you will be responsible for the full amount of the rent.

Any responses regarding this matter are to be directed to the Re-Examination Department.

Sincerely,

/s/ Anthony Amoroso
ANTHONY AMOROSO
Re-Examination Department
Section 8 Housing Program

AA: jz
cc: Owner
Devirgiliis
P.H.A. – Legal
Re-Examination Dept.
File

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed APR. 27, 1983]

C.A. NO. 79-4190
CLASS ACTION

VANESSA HENDERSON, et al.

vs.

ANTHONY MORRONE, et al.

ORDER

AND NOW, this 27th day of April, 1983, upon consideration of the Stipulation filed by both parties and a hearing held pursuant to Fed.R.Civ.P. 23(e) on the objections thereto in the above-captioned matter, IT IS ORDERED that the Stipulation submitted to the Court and entered into by the parties in full settlement of this matter is hereby APPROVED and entered as the Order of this Court; and

IT IS FURTHER ORDERED that plaintiffs and defendants and their successors shall abide by and implement the procedures and agreements which are set forth in said Stipulation and specifically incorporated by reference herein.

All parties shall bear their own costs, expenses, and attorney's fees.

BY THE COURT:

/s/ Clifford Scott Green
CLIFFORD SCOTT GREEN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed NOV. 26 1982]

CIVIL ACTION
NO. 79-4190
CLASS ACTION

VANESSA HENDERSON, et al.

vs.

ANTHONY MORRONE, et al.

STIPULATION

Plaintiffs have commenced a civil class action seeking injunctive and declaratory relief, as well as damages, to enjoin and declare as violative of their constitutional and statutory rights the defendants' failure to provide tenants under the Section 8 Housing Assistance Payments Program-Existing Housing (hereinafter referred to as "Program") with notice and an opportunity to be heard prior to the termination of the tenants from participation in the Program. Defendants dispute that plaintiffs have been deprived of any rights or that defendants have breached or failed to perform any duties or obligations owing to plaintiffs.

Plaintiffs and defendants have agreed and executed a Stipulation that this action may proceed as a class action. The class is defined as all persons who are presently or may in the future be tenants under the Section 8 Housing Assistance Payments Program—Existing Housing.

The parties are mutually desirous of effectuating a settlement of the matters raised by plaintiffs' Complaint by entering into a settlement resolving the issues presented therein.

Both plaintiffs and defendants, however, maintain that the respective allegations as advanced in this action are meritorious and that the Court would so find following litigation. Adherence by the parties to this agreement shall not be construed as an admission to the truth of any of those allegations.

Therefore, in the interest of avoiding litigation, the parties hereby agree to be bound as follows:

1. The defendants may terminate a recipient from the Section 8 Existing Housing Program only for good cause. Such good cause shall be as specified in the applicable HUD regulations and HUD Handbook 7420.7.

2. Written notice of such good cause reasons for termination shall be provided to future recipients when they are accepted by the program.

3. Upon a decision to terminate Section 8 assistance, the Housing Authority shall give thirty-day advance written notice of its intent to the recipient as set forth in Exhibit A attached hereto and incorporated herein. Such notice shall include the reason for the termination, the right of the recipient to request, within ten (10) days, an informal hearing, and the right of the recipient to be represented at the hearing, at his/her own expense, by counsel or other representative of his/her choice.

4. Upon receipt of a tenant's Request for a Hearing, the Housing Authority shall give the tenant a written explanation of the hearing procedure and inform the tenant of the hearing date giving sufficient time to prepare for the hearing, at a time during a working day. The parties shall, either in person or by first class U.S. mail, be served notice of the time and place of the hearing, at least ten days prior to the hearing. Section 8 payments shall continue until a final decision of the hearing officer is rendered.

5. Hearings may be continued at the request of either the Housing Authority or tenant for good cause such as illness or other unavoidable absence of a party or witness, or by agreement between the Housing Authority and the tenant.

6. The issue to be determined at such hearings shall be whether the Housing Authority has good cause as defined in paragraph 1 of this Stipulation to terminate the tenant's housing assistance subsidy.

7. For purposes of the hearing, the tenant shall:

A. Have the right to retain counsel or other representative, if desired, at his/her own expense.

B. Be given an opportunity to examine evidence and question any adverse witnesses, and to present testimony in his/her favor.

C. Be permitted to examine before the hearing, and to copy at his/her expense, all documents of PHA that are relevant to the hearing. If a document is not made available, after request therefor by the tenant, and PHA attempts to rely on it at the hearing, the tenant shall have the right to continue the hearing in order to present evidence in rebuttal.

8. The hearing decision must be in writing, must be based solely on evidence provided at the hearing, and must state the legal and evidentiary grounds for the decision. In addition, it must be dated and signed by the hearing officer, and shall be forwarded to all parties and their representatives within a reasonable time after the conclusion of the hearing.

9. The hearing officer may be a PHA employee subject to the following provisions:

A. Parties or their representative in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact or law in that contested case, with individuals assigned to render a proposed or final decision or to make findings of fact or conclusions of law in that

contested case, except upon notice and opportunity for all parties to participate.

B. No individual who participates in the making of the decision at the informal hearing shall be involved in the day to day administration of the program.

10. The decision of the hearing officer shall go into effect immediately after the issuance of the decision in writing. A tenant may appeal from the decision with thirty (30) days after issuance of said decision. The appeal shall be governed by the provisions of the Pennsylvania Local Agency Law, 2 Pa. C.S.A. §§751-754. The hearing officer shall issue with the decision a notice of the tenant's right to appeal within thirty (30) days. PHA shall not be obligated to continue to make HAP Housing Assistance Payments after a decision by the hearing officer adverse to the tenant.

11. If the hearing officer's decision is vague or ambiguous, either party may petition for clarification of the decision within fifteen (15) days after the decision. The party filing the petition shall give five (5) days' notice of the petition to all other parties. The hearing officer shall respond promptly with a clarification of the decision. The decision will not become a final adjudication until the clarification is issued.

12. Notwithstanding the foregoing appeal provisions, a tenant waives no rights, claims or defenses in any eviction action commenced in a judicial forum.

13. Should the United States Department of Housing and Urban Development promulgate regulations which require PHA to perform acts which are inconsistent with this Stipulation or which prohibit PHA from performing acts consistent with this Stipulation, such regulations shall govern. In the event that such regulations are promulgated either party shall file an appropriate petition to modify this decree. This provision shall not be construed as a waiver of either party's

right to challenge the validity of such regulations in an appropriate forum.

14. All parties shall bear their own costs, expenses and attorney's fees.

/s/ Clifford Scott Green
CLIFFORD SCOTT GREEN
Judge
November 26, 1982

/s/ Fincourt B. Shelton
FINCOURT B. SHELTON, Esquire
Attorney for Defendants

/s/ Arthur E. Schmidt
GEORGE D. GOULD
ARTHUR E. SCHMIDT
Attorneys for Plaintiffs

Date: 11/18/82

NOTICE OF INTENTION TO TERMINATE HOUSING ASSISTANCE PAYMENTS

TO: Date:

Dear Mr./Ms.:

You are hereby notified that the Philadelphia Housing Authority intends to terminate your Section 8 Housing Assistance Payments thirty (30) days from the date of this letter. The reason for the termination is as follows:

The nature of the evidence against you is:

* * * *

You may request a hearing to challenge the proposed termination by signing and sending to the Philadelphia Housing Authority the bottom portion of this letter entitled *Request for Hearing*. This Request must be sent within ten (10) days/to: after this notice was mailed,

Section 8 Housing Program
Philadelphia Housing Authority
1216 Walnut Street
Philadelphia, Pennsylvania 19107

If you send a timely Request to PHA, a hearing will be scheduled during working hours at PHA offices at 1216 Walnut Street. For purposes of the hearing, you have the following rights: a) to examine before the hearing, and, at your expense, to copy all documents, records, and regulations of PHA that are relevant to the hearing; b) to be represented by counsel or other representative, at your expense; c) to confront and cross-examine adverse witnesses; d) to present evidence on your own behalf; e) to appeal the decision of the hearing officer.

If you request a hearing, your Section 8 benefits will continue until a decision is made.

_____

Section 8 Housing Program
Philadelphia Housing Authority

* * * *

REQUEST FOR HEARING

I hereby request a hearing to challenge the decision of the Philadelphia Housing Authority to terminate my Section 8 Housing Assistance Payments.

_____

(Signature of Tenant)

_____

(Address of Tenant) Date:

Date:

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 79-4190

VANESSA HENDERSON,
PLAINTIFF,

VS.

PHILADELPHIA HOUSING AUTHORITY, et al,
DEFENDANTS.

PHILADELPHIA, PA.
SEPTEMBER 15, 2005

BEFORE CLIFFORD SCOTT GREEN,S.J.

HEARING

APPEARANCES:

FOR THE PLAINTIFFS:

COMMUNITY LEGAL SERVICES, INC.
BY: GEORGE D. GOULD, ESQ.
PAUL A. BROOKS, ESQ.
1424 CHESTNUT STREET
PHILADELPHIA, PA 191102-02505

FOR THE DEFENDANTS:

WOLF BLOCK
BY: SUSAN J. FRENCH, ESQ.
VIRGINIA L. HOGBEN, ESQ.
1650 ARCH STREET
22ND FLOOR
PHILADELPHIA, PA. 19103

SIDNEY S. ROTHSCHILD
OFFICIAL COURT REPORTER
ROOM 1234 - U.S. COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA. 19106.
(215) 627-0184

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

* * * *

MR. BROOKS: GOOD MORNING.

MS. FRENCH: GOOD MORNING.

THE COURT: HOW ARE YOU?

I GUESS THIS DECREE HAS BEEN HERE AS LONG AS I HAVE, NOT QUITE, BUT ALMOST.

WHAT IS THE REAL PRACTICAL PROBLEM IN REGARD TO VACATING IT?

MR. BROOKS: IN REGARD TO VACATING IT.

THE COURT: NOBODY USES IT.

MR. BROOKS: WE FEEL IT IS QUITE HELPFUL TO HAVE AN ENFORCEABLE ORDER. AND, THERE ARE PROVISIONS IN THE CONSENT DECREE SUCH AS THE REQUIREMENT THAT PHA GIVES 10 DAYS ADVANCED WRITTEN NOTICE OF A HEARING AND AT LEAST 30 DAYS NOTICE BEFORE TERMINATION PROVISIONS IN THE CONSENT DECREE, WHICH ARE NOT IN THE REGULATIONS. THEY DON'T CONFLICT WITH THE REGULATIONS, BUT THEY PROVIDE ADDED VALUE TO THE TENANTS AND WE HATE TO LOSE THOSE PROTECTIONS FOR OUR CLIENTS.

THE COURT: THE DEFENDANTS GO BACK TO SUMMARILY HOUSEKEEPING PEOPLE, WHY CAN'T YOU GET THEM DUTY FREE.

MR. BROOKS: IT IS A—

THE COURT: YOU HAVEN'T USED THIS ONE.

MR. BROOKS: JUST BECAUSE WE HAVEN'T MOVED TO ENFORCE IT DOESN'T MEAN IT IS NOT USEFUL.

THE COURT: I UNDERSTAND YOU ARE SAYING IT IS LIKE A CLUB AND IT MAKES THEM—

MR. BROOKS: IT IS OUT THERE.

THE COURT: MAKING THEM ABIDE BY IT.

UNDER THAT REASONING, IT WOULD BE HERE FOREVER.

MR. BROOKS: YOUR HONOR, I THINK AS LONG AS IT CONTINUES—

THE COURT: WHEN WOULD IT BE—

MR. BROOKS: AS LONG AS IT CONTINUES TO HAVE FORCE AND VITALITY, AS LONG AS NOTHING HAPPENS TO MAKE IT BURDENSOME ON PHA, THERE'S NO REASON IT SHOULDN'T BE HERE INDEFINITELY, YOUR HONOR.

THE COURT: SO YOU ARE TALKING ABOUT A 10-DAY NOTICE.

MR. BROOKS: WE OUTLINED I BELIEVE

EIGHT POINTS ON PAGE 16 OF THE BRIEF, EACH OF WHICH IS A SUPPLEMENTAL TO THE ADDED VALUE PROVISION OF THE CONSENT DECREE. I MENTIONED THAT THE 10 DAYS ADVANCED NOTICE WAS ONE OF THE ONES WE FIND VERY VALUABLE. OUR CLIENTS FOR EXAMPLE, THEIR MEMORY IS NOT THAT GOOD, THEY HAVE MANY THINGS GOING ON IN THEIR LIVES, GETTING THE NOTICE MAILED AT LEAST 10 DAYS BEFORE THE

HEARING IS IMPORTANT TO THEM, BECAUSE IT MEANS THAT THEY HAVE A PRETTY GOOD CHANCE OF GETTING TO THEIR LAWYER AND GETTING TO THE HEARING.

THE COURT: HOW MANY CASES DO YOU HAVE THAT THEY DON'T HAVE THAT REALLY.

MR. BROOKS: THEY DON'T HAVE THE 10-DAY NOTICE? IT HAS BEEN A PROBLEM OFF AND ON OVER THE YEARS. AT PRESENT THEY ARE DOING SOMEWHAT BETTER. THERE ARE ALWAYS PROBLEMS IN SCATTERED CASES. WE HAD PERIODS OF TIME IN THE 10 YEARS I HAVE BEEN DOING THESE NUTS AND BOLTS CASES, BUT WE HAD A LOT OF PROBLEMS WITH 10 DAY NOTICES. THE NOTICE WOULD BE DATED 10 DAYS, NOT MAILED FOR SEVERAL DAYS, BY THE TIME THAT IT GOT TO THE CLIENTS, THEY ACTUALLY GOT IT IN THE MAIL BOX, IT WAS SEVEN DAYS, AND IT GIVES THE CLIENTS FIVE DAYS.

IF, FOR EXAMPLE, PHA—

THE COURT: WHY CAN'T YOU CALL OPPOSING COUNSEL TO SAY YOU HAD FIVE DAYS NOTICE.

MR. BROOKS: WITH PHA PRESENT DAY COUNSEL, WE GET ALONG FINE. WE POINT OUT THE PROBLEMS, THE MATTER IS CONTINUED. THERE IS NO SERIOUS PROBLEM. THAT HAS NOT ALWAYS BEEN TRUE, YOUR HONOR. SOME PHA COUNSEL OVER THE YEARS, PRESENT MEMBERS EXCEPTED, QUITE FRANKLY, HAVE BEEN VERY DIFFICULT TO EVEN REACH ON THE PHONE. NONETHELESS, YOU KNOW ONCE AGAIN KNOWING THE RIGHT IS OUT THERE IS IMPORTANT.

THE COURT: ALL RIGHT.

MR. BROOKS: BEING ABLE TO ENFORCE IT, IF NECESSARY, WHY SHOULD WE FILE A NEW LAWSUIT, TAKE THE COURT'S TIME, OUR TIME ALSO WITH EVERY LAWSUIT AND EVERY SETTLEMENT. IT IS A ROLL OF THE DICE, IF YOU WILL COME OUT BETTER OR WORSE. WE BARGAINED FOR IT. I BELIEVE THERE WERE NO COUNSEL FEES IN THE CASE. WE GAVE IT UP. THE TENANTS GAVE UP OTHER POSSIBLE THINGS THEY WANTED TO WIN. GIVEN THE PRESENT REGULATIONS, IT PROBABLY WOULD BE HARD TO GET SOMETHING LIKE THE 10 DAY ADVANCED NOTICE IF WE HAD TO SUE OVER AGAIN.

THE COURT: WHEN YOU DON'T GET—YOU DON'T COME DOWN HERE.

MR. BROOKS: IF WE SAW A SYSTEMIC PROBLEM OR IF WE SAW A POLICY DECISION BY PHA, WE WOULD FILE. FOR SPORADIC PROBLEMS, AS LONG AS PHA COUNSEL STAFF, COUNSEL CONTINUE TO DEAL WITH THESE PROBLEMS APPROPRIATELY IN AN INFORMAL MANNER, OF COURSE, WE DON'T WASTE THE COURT'S TIME.

MS. FRENCH: I'M SUSAN FRENCH. I REPRESENT THE PHILADELPHIA HOUSING AUTHORITY. WITH ME IS MY COLLEAGUE, LYNN HOGBEN. IN THE AUDIENCE BEHIND ME IS ASSISTANT GENERAL COUNSEL OF THE HOUSING AUTHORITY, SHELLY JAMES.

IF I MAY, YOUR HONOR, COMMUNITY LEGAL SERVICES REPRESENTS THE PLAINTIFFS HERE, WHO HAVEN'T BEEN TO THIS COURT IN 22 YEARS. THEY CONCEDE THAT PHA GENERALLY FOLLOWS THE POLICY AND PROCEDURES SET FORTH IN THIS DECREE.

ALL THAT PHA IS ASKING, THAT IT BE ALLOWED TO UTILIZE THE CURRENT HUD REGULATIONS TO SCHEDULE HEARINGS FOR TERMINATIONS OF SECTION 8 HOUSING BENEFITS.

AND, MOREOVER, YOUR HONOR, EVEN IF YOUR HONOR VACATED THIS DECREE TODAY, HUD REGULATIONS REQUIRE THAT BEFORE PHA COULD CHANGE ITS PROCEDURE IN ANY WAY, IT WOULD HAVE TO PUBLISH NOTICE TO THE TENANTS AND THE COMMUNITY GROUPS. THE HUD REGULATIONS REQUIRE REASONABLE NOTICE. WHILE MR. BROOKS WAS REFERRING TO THIS 10 DAY NOTICE OF HEARING REQUIREMENT, IF PHA DECIDED TO CHANGE ITS PROCEDURE, IT STILL HAS TO PROVIDE FOR REASONABLE NOTICE.

THE COURT: WHAT IS ITS PROCEDURES AND POLICY, IN TERMS OF TIME AND NOTICE?

MS. FRENCH: IN TERMS OF TIME AND NOTICE RIGHT NOW THE PROCEDURE IS 10 DAYS BECAUSE WE ARE BOUND BY THIS DECREE.

THE HUD REGULATIONS—

THE COURT: THAT'S WHAT THEY ARE AFRAID OF.

MR. FRENCH: THEY MAY BE AFRAID WE WILL CHANGE IT IN SOMEWAY, IT COULD BE CHANGED FOR THE BENEFIT OF THE TENANTS. FOR EXAMPLE, THIS DECREE REQUIRES HEARINGS BE SET ONLY DURING HEARING HOURS IN THE DAY TIME. ONE OF THE THINGS THAT PHA IS CONSIDERING HAVING EVENING HOURS FOR THOSE TENANTS IN BOTH CONVENTIONAL HOUSING AND CONVENTIONAL SECTION 8 HOUSING WHO WORK DURING THE DAY AND WOULD PREFER THE EVENING HOURS. IT IS MORE CONVENIENT FOR THEM; WE

ARE PRECLUDED FROM DOING THAT BY THIS DECREE.

ALL WE ARE ASKING IS THE OPPORTUNITY TO OPERATE OUR NOTICE AND TERMINATION AND HEARING PROGRAM IN THE SAME MANNER AS VIRTUALLY EVERY OTHER HOUSING AUTHORITY IN THE COUNTRY, UNDER THE REGULATIONS PRESCRIBED BY HUD, WHICH THE THIRD CIRCUIT HAS HELD, YOUR HONOR, PROVIDE ADEQUATE DUE PROCESS PROTECTIONS TO THE TENANTS.

MR. BROOKS: YOUR HONOR, IF I MIGHT RESPOND TO A COUPLE OF THE POINTS.

I DON'T KNOW WHERE IN THE CONSENT DECREE, TAKING A LOOK AT IT, I NEVER HEARD OF ANY PROPOSAL TO HAVE EVENING OR WEEKEND HEARINGS. I DON'T KNOW ANYTHING IN THE CONSENT DECREE THAT FORBIDS IT. CERTAINLY IF PHA WANTED TO DO THAT, AND IT WAS OPTIONAL FOR OUR TENANTS, OF COURSE WE WOULD AGREE. THAT REALLY GETS TO THE NUB OF THE PROBLEM. PHA IS TRYING. TO CREATE THIS ALLUSION THERE IS A PROBLEM WITH THE CONSENT DECREE THAT REQUIRES THE WHOLE THING TO BE THROWN OUT, WHEN NO SUCH PROBLEM EXISTS.

IF THEY WANTED TO PROVIDE ADDED VALUE TO THE TENANTS ON THEIR OWN, WE ARE PERFECTLY WILLING TO DO THAT, AS LONG AS IT IS NOT REQUIRED, WE WILL NOT AGREE TO SOMETHING THAT FORCES A TENANT ON SATURDAY, TO ATTEND A HEARING ON SATURDAYS.

WITH RESPECT TO NOTICES, I THINK MAYBE I, AT LEAST, WAS A LITTLE CONFUSED. I'M TALKING ABOUT THE NOTICE OF THE HEARING IN THE SPECIFIC CASE, THE FACT THAT PHA WOULD HAVE

TO GIVE PUBLIC NOTICE BEFORE IT CHANGED ITS SECTION 8 HEARING PROCEDURE. I MEAN IT IS NICE, YOUR HONOR, BUT AS A PRACTICAL MATTER, THE ADMINISTRATIVE AGENCY HAS VERY WIDE DISCRETION.

THE COURT: DO YOU HAVE ANY DIFFICULTY WITH THEM CONFORMING TO HUD'S PROCEDURES?

MR. BROOKS: YOUR HONOR, HUD'S PROCEDURES ARE, THEY ARE GOOD, NOT AS GOOD AS THIS CONSENT DECREE, YOUR HONOR. OUR CONSENT DECREE IS BETTER IN AT LEAST EIGHT WAYS. WE FOUGHT FOR THAT AND THEY CONTINUE TO HAVE VALUE. WE ARE CONCERNED THAT IF PHA IS RELIEVED OF THE CONSENT DECREE, WOULD TRY TO WIDDLE AWAY AT THAT, AND WOULD BE FREE TO DO SO.

SURE THEY HAVE TO PUBLISH A NOTICE, TWO MONTHS LATER AFTER FOLLOWING SOME KIND OF A PUBLIC HEARING THEY GO AHEAD TO DO WHAT THEY WANT TO DO ANYWAY. IF THEY HAVE PROBLEMS WITH THE DECREE, WE WILL AGREE TO REALISTIC CHANGES. THEY NEVER CAME TO US WITH A SUSPECT PROBLEM ABOUT IT.

THEY ARE CREATING THIS ALLUSION OF PROBLEMS IN AN EFFORT TO GET RID OF THE DECREE WHOLESALE, TO BE FREE FROM ITS OBLIGATIONS, TO BE FREE FROM THE BARGAIN THEY STRUCK. SOME CONSENT DECREES HAVE TIME LIMITS, PARTIES OFTEN NEGOTIATE TIME LIMITS. THE PARTIES HERE DID NOT NEGOTIATE A TIME LIMIT, THAT WAS PART OF THE BARGAIN TOO.

THE COURT: ALL RIGHT.

WELL, I KNOW WHAT THE PROBLEM IS. I HAD THIS ARGUMENT BECAUSE YOU ASKED FOR IT. I WANTED YOU TO HAVE THE OPPORTUNITY TO ARGUE IT.

I AM OF A MIND TO VACATE IT MAINLY BECAUSE IT SEEMS TO ME THAT THERE IS NOT NOW ANY REALISTIC PROBLEM FROM WHICH THE CONSENT DECREE PROTECTS ANYONE.

I MEAN, YOU ARE SAYING THAT IT IS THERE AND SO, THEREFORE THEY DON'T GO ANY FURTHER, BUT, IT SEEMS TO ME THAT YOU HAVE AS MUCH PROTECTION PURSUANT TO THE HUD REGULATIONS AS YOU DO PURSUANT TO THE CONSENT DECREE.

NOW, IF THAT WERE TO CHANGE, PRESUMABLY THEY WERE GOING TO MAKE SOME DRACONIAN CHANGE THAT THREATENED THE CONSTITUTIONAL RIGHTS OF YOUR CLIENTS AND THEY GAVE NOTICE OF THIS, I TAKE IT THAT THERE IS NOTHING TO PREVENT YOU FROM FILING A LAWSUIT.

MR. BROOKS: YOUR HONOR, WITH ALL DUE RESPECT, I HEAR WHAT YOU ARE SAYING BUT I'M CONCERNED THAT THE SORT OF BURDEN OF PROOF HERE IS PUT IN THE OPPOSITE DIRECTION FROM WHERE IT WOULD BE. THERE IS LANGUAGE IN THE RUFO CASE, YOUR HONOR, THAT DISCUSSES THE SIGNIFICANCE OF PROVISIONS IN CONSENT DECREES WHICH GO BEYOND WHAT THE CONSTITUTION REQUIRES.

AND RUFO ACTUALLY SAYS THAT THESE PROVISIONS ARE FINE, THEY ARE ACCEPTABLE, THEY ARE PART OF ANY BARGAIN. IT IS SOMETHING THAT PLAINTIFF CAN HOPE FOR AND SOMETIMES

ACHIEVE. THE FACT THAT WE WOULD—STILL OUR TENANTS WOULD BE PROTECTED BY THE REGULATIONS SIMPLY IS NOT A RELEVANT FACTOR IN DECIDING WHETHER TO VACATE THIS DECREE.

THE DECREE IS THE, AS RUFO PUTS IT, SHOULD BE—IT SHOULD BE RETAINED AS LONG AS IT HAS CONTINUING USEFULNESS AND VITALITY. TO JUST SAY, BECAUSE IT IS 22 YEARS OLD, THE TENANTS ARE NOW LEFT WITH THE HUD REGULATIONS IS PUTTING THE ENTIRE BURDEN OF SHOWING A BASIS FOR VACATING IT IN THE OPPOSITE DIRECTION.

WE HAVE TO SHOW SOME REASON WHY IT SHOULD BE CONTINUED TO BE NEEDED. WE ARTICULATED AT LEAST EIGHT WAYS THAT THIS DECREE PROVIDES EXTRA PROTECTIONS FOR OUR TENANTS. THERE IS NO SHOWING, WITHOUT ANY SHOWING BY PHA THEY SHOULD BE ABLE TO CHANGE THEIR POLICIES IN THAT REGARD.

WITH RESPECT TO WHAT PHA WOULD DO IF RELIEVED OF THEIR OBLIGATIONS, THEY SAID THEY WANTED TO CHANGE THEIR POLICIES IN WAYS TO BRING THEM CLOSER TO THE REGULATIONS, THAT WOULD BE FINE, EXCEPT THAT'S NOT WHAT THEY AGREED TO DO IN 1982, IN COMPLYING WITH REALISTIC—

THE COURT: DO YOU THINK IN 1982 THEY AGREED AND EXPRESSLY AGREED THAT THEY WOULD NEVER CHANGE THEIR POLICY WITHOUT YOUR APPROVAL.

MR. BROOKS: YOUR HONOR, I THINK THEY EXPRESSLY AGREED THAT THEY WOULD NOT CHANGE THESE PARTICULAR ASPECTS OF THEIR POLICY, YES.

REMEMBER THERE WERE PROPOSED HUD REGULATIONS ON THE TABLE FIVE MONTHS BEFORE THIS CONSENT DECREE WAS SIGNED. FIVE MONTHS BEFORE IT WAS STIPULATED, PROPOSED HUD REGULATIONS THAT WERE IN MANY RESPECTS SIMILAR TO THE FINAL HUD REGULATIONS. TO GO BACK TO THE 10 DAY HEARING NOTICE EXAMPLE THAT PHA HAS TO GIVE REASONABLE NOTICE AS THE REGULATIONS DO TODAY, WHAT'S REASONABLE IN SOME CONTEXTS, SEVEN DAYS OR EVEN FIVE DAYS ADVANCED NOTICE OF A HEARING HAVE BEEN HELD TO BE REASONABLE.

BUT, TO TAKE THE EXAMPLE GIVEN BY MS. FRENCH FOR A TENANT WORKING IN A LOW WAGE JOB, WHO CAN GET FIRED FOR TAKING TIME OFF FROM WORK, IT CAN MAKE A BIG DIFFERENCE IF THEY GET A 10 DAY, SEVEN DAY OR FIVE DAY NOTICE. IF YOU VACATE THIS DECREE, PHA SAYS, WELL, WE HAVE A LITTLE TROUBLE GETTING OUR HEARINGS LINED UP 10 DAYS IN ADVANCE, WE WILL MAKE IT SEVEN DAYS, IS THAT CONSTITUTIONAL? PROBABLY. IS IT PERMITTED BY HUD REGULATIONS? PROBABLY, YES. COULD WE FILE A LAWSUIT AND HOPE TO WIN 10 DAYS? WE WOULD HAVE A VERY HARD TIME.

THE COURT: IT IS PERMITTED ONLY IF REASONABLE, THEN THERE MAY BE A CIRCUMSTANCE UNDER WHICH IT WOULD BE REASONABLE TO HAVE A HEARING.

MR. BROOKS: I'M NOT SURE THAT I FOLLOW YOUR HONOR.

THE COURT: I SAY THERE MAY BE A CIRCUMSTANCE UNDER WHICH THERE WOULD BE A REASONABLE BASIS FOR GIVING LESS THAN 10 DAYS NOTICE.

MR. BROOKS: WELL, MAYBE IN AN EMERGENCY KIND OF BASIS. IF THERE IS A PROBLEM WITH THAT KIND OF THING, PHA NEVER ARTICULATED IT. IF THERE IS SUCH A REAL PROBLEM, THE APPROPRIATE REMEDY IS TO COME FORWARD TO ASK THIS COURT TO MODIFY THE CONSENT DECREE IN A PARTICULAR WAY. SO TO TRY TO IMAGINE AN EXAMPLE, MAYBE THEY HAVE SOLID INFORMATION THAT THERE'S SOMETHING VERY SERIOUSLY GOING WRONG AT A PARTICULAR TENANT'S HOUSE. AND THEY WANTED TO HAVE THIS HEARING AND GET IT OVER WITH ASAP. THEY PROPOSE SOMETHING, WE EITHER AGREE TO IT OR YOUR HONOR, IF WE DON'T AGREE WITH IT AND YOUR HONOR FEELS IT IS REASONABLE, YOU MODIFY THE DECREE ACCORDINGLY. THAT'S THE APPROPRIATE STANDARD HERE, IS THERE A PROBLEM? HOW DO YOU FIX THE PROBLEM? YOU DON'T SAY THE CONSENT DECREE IS 22 YEARS OLD AND YOU HAD A GOOD RUN. IT IS OVER NOW.

THAT'S BASICALLY SAYING THAT EVERY CONSENT DECREE DIES AFTER AWHILE, EVEN IF THAT IS NOT WHAT IT SAYS. THAT'S NOT WHAT RUFO SAID.

THE COURT: IF YOU HAVE CONFORMITY AND THERE ARE REGULATIONS WHICH WOULD APPEAR TO BE ABOUT AS PROTECTED AS THE CONSENT DECREE, MAYBE MORE SO, WHY DO YOU KEEP A CONSENT DECREE FOREVER?

MR. BROOKS: IF WE HAD THAT KIND OF REGULATION HERE, YOUR HONOR, WE WOULDN'T HAVE ANY PROBLEM WITH VACATING THIS CONSENT DECREE.

I CAN ONLY GO BACK TO THE FACT TO STATE—

THE COURT: THAT'S WHAT I'M ASKING YOU, WHAT IN THE REGULATIONS DO YOU FIND BURDENS YOU.

MR. BROOKS: IT IS NOT A QUESTION OF THE REGULATIONS BURDENING US. IT IS A QUESTION OF THE REGULATIONS NOT BEING AS PROTECTIVE AS THE CONSENT DECREE. TO START WITH, THE CONSENT DECREE, NOT THE REGULATIONS REQUIRES 30 DAYS ADVANCED WRITTEN NOTICE OF THE INTENT TO TERMINATE. NOW, THIS BECOMES AN IMPORTANT FACTOR BECAUSE REMEMBER SECTION 8 TENANTS HAVE LANDLORDS AND IT MEANS THAT THE TENANT HAS AT LEAST 30 DAYS TO TRY TO RESOLVE A PROBLEM WITH SECTION 8, PERHAPS OVER THE NUMBER OF INDIVIDUALS LIVING IN THE HOUSEHOLD. PERHAPS OVER THE AMOUNT OF THEIR INCOME. THE AMOUNT OF THE RENT THAT SHOULD BE CHARGED. THEY HAVE AT LEAST 30 DAYS TO TRY TO RESOLVE THAT PROBLEM, EXCUSE ME, THAT THEY HAVE, WITH SECTION 8, BEFORE THE MONEY TO THEIR LANDLORD IS CUT OFF. BECAUSE YOU BETTER BELIEVE, AS SOON AS THE MONEY IS CUT OFF TO THE LANDLORD, ON THE 31ST DAY, THAT LANDLORD HAS THE EVICTION NOTICE COMING.

NOW THE TENANT IS ON A VERY FAST TRACK TOWARD EVICTION. UNDER PENNSYLVANIA PROCEDURES, IT CAN OCCUR IN ABOUT 35 DAYS AFTER THE FILING OF A LANDLORD TENANT COMPLAINT UNTIL YOU ARE ON THE STREET, THAT'S ONE REASON THE 30 DAY PROVISION IS IMPORTANT.

WE ALREADY DISCUSSED THE 10 DAYS ADVANCED NOTICE OF THE HEARING.

THE CONSENT DECREE REQUIRES THAT THE NOTICE OF THE HEARING INFORM THE TENANT ABOUT HER RIGHT TO DISCOVERY OF DOCUMENTS, ABOUT HER RIGHT TO BE REPRESENTED. DISCOVERY OF DOCUMENTS, I DON'T HAVE TO TELL YOUR HONOR HOW IMPORTANT THAT IS.

SO, SURE, THE RIGHT IS THERE, IF THE TENANT DOESN'T KNOW ABOUT IT, IT WILL BE WORTHLESS TO HER.

MS. FRENCH: DISCOVERY OF DOCUMENTS IS NOT A RIGHT—

MR. BROOKS: THERE'S A DISTINCTION, THE REGS REQUIRE DISCOVERY OF DOCUMENTS, THEY DON'T REQUIRE A NOTICE OF A HEARING TELLING THE TENANT ABOUT THEIR RIGHTS. UNLESS THAT TENANT HAPPENS TO GET INTO CLS IN TIME, WE WILL NEVER KNOW ABOUT IT. IT IS A RIGHT THEY DON'T KNOW, IT IS USELESS TO THEM. ON THE FLIP SIDE, I HAVE TO SAY HOW BURDENSOME IS IT TO PUT THAT IN THE NOTICE? IT IS AN EXTRA SENTENCE, IF THAT. WHERE IS THE PROBLEM HERE.

BUT, THAT'S ANOTHER EXAMPLE OF AN IMPORTANT SUPPLEMENTAL PROVISION OF THIS CONSENT DECREE THAT WOULD BE LOST IF WE FELL BACK ON THE REGULATIONS.

THE COURT: WHY DON'T YOU PUT IT IN THE NOTICE?

MS. FRENCH: WE CERTAINLY WILL, YOUR HONOR.

MR. BROOKS: PRESENTLY, IT IS, YOUR HONOR.

IT IS IN THERE BECAUSE THE CONSENT DECREE REQUIRES IT. IF THE CONSENT DECREE—

THE COURT: I DON'T KNOW WHAT YOU MEAN.

YOU ARE SAYING IT IS IN THERE BY IMPLICATION BECAUSE—WHY IF IT IS EXPRESSLY IN THE REGULATIONS AND IT GOES IN THE NOTICE, HOW ARE YOU HURT.

MR. BROOKS: THE REGULATIONS DO NOT REQUIRE THEM TO STATE IN THE ADVANCED HEARING NOTICE THAT THE TENANT IS ENTITLED TO LOOK AT THE DOCUMENTS PHA WILL USE AGAINST HIM BEFORE THE HEARING.

SO, YES, IF THE TENANT GETS INTO OUR OFFICE AND WE TELL THEM, YES, YOU HAVE THE RIGHT TO LOOK AT THE DOCUMENTS, SOME POLICE REPORT FOR EXAMPLE OR SOME INCOME THEY SUPPOSEDLY FAILED TO VERIFY, SURE, IF THEY GET TO CLS, THEY KNOW ABOUT THE RIGHT, IT IS USABLE. MOST TENANTS DON'T GET TO US BEFORE THE HEARING, YOUR HONOR.

MS. FRENCH: YOUR HONOR, COUNSEL IS MISCHARACTERIZING THE REGULATIONS. THE REGULATIONS SAY THAT IF THE HOUSING AUTHORITY INTENDS TO USE ANY DOCUMENTS AT THE HEARING, THAT THEY HAVE TO SHOW THEM TO THE TENANT FIRST. IF THEY DON'T SHOW THEM TO THE TENANTS IN ADVANCE OF THE HEARING, THEY CAN'T USE THOSE DOCUMENTS AT THE HEARING.

SO, EVEN THOUGH THE WORDING, THE SEMANTICS OF THE REGULATION MAY BE DIFFERENT THAN IN THE CONSENT DECREE, THE PURPOSE IS THE SAME. WE HAVE TO SHOW THE DOCUMENTS TO THE TENANTS BEFORE THE HEARING UNDER THE REGULATIONS OR BE PRECLUDED FROM USING THEM, SIMILAR TO USING DOCUMENTS AT A TRIAL IN FEDERAL COURT.

MR. BROOKS: THE DIFFERENCE IS, YOUR HONOR, FIRST OF ALL THERE'S NOTHING IN THE REGULATIONS THAT PRECLUDES PHA FROM USING DOCUMENTS, IF THE TENANT DIDN'T REQUEST TO USE THEM IN ADVANCE.

SECONDLY, AS COUNSEL WELL KNOWS, THERE'S A DIFFERENCE OF SEEING A DOCUMENT AT THE TIME OF THE HEARING AND SEEING IT IN ADVANCE OF THE HEARING.

UNLESS THE NOTICE TELLS THEM YOU CAN SEE IT IN ADVANCE OF THE HEARING, THEY WILL NOT KNOW THAT.

THESE ARE NOT SOPHISTICATED LITIGANTS. THEY DON'T HAVE THE REGS. THAT'S WHY IT IS IN THE NOTICE AND IT IS IMPORTANT TO BE IN THE NOTICE.

THE COURT: IF THEY DIDN'T COME TO CLS. IF THEY COME TO CLS, THEY KNOW.

MR. BROOKS: THE CONSENT DECREE RELIEVED PHA OF THE SIMPLE OBLIGATION OF TELLING THEM 10 DAYS IN ADVANCE, YOU GOT A HEARING, BEFORE THE HEARING YOU CAN SEE THE DOCUMENTS.

MS. FRENCH: YOUR HONOR, WHAT COUNSEL HAS ILLUSTRATED, THAT ANY DIFFERENCE BETWEEN THE DECREE AND THE REGULATIONS ARE AT BEST MINOR.

IN FACT, THE DECREE ITSELF CONTAINS AN EXPRESS PARAGRAPH, THAT SAYS SHOULD THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT PROMULGATE REGULATIONS WHICH REQUIRE PHA TO PERFORM ACTS INCONSISTENT WITH THE STIPULATION OR WHICH

PROHIBIT PHA FROM PERFORMING ACTS CONSISTENT WITH THE STIPULATION SUCH REGULATIONS SHALL GOVERN.

SO THE CONSENT DECREE ITSELF SAYS, IF THE REGULATIONS ARE INCONSISTENT WITH THE DECREE, THE REGULATIONS PREVAIL. THAT'S WHAT WE ARE ASKING FOR THE COURT TO DO HERE TODAY.

THE CONSENT DECREE FURTHER SAYS: IN THE EVENT SUCH REGULATIONS ARE PROMULGATED, EITHER PARTY MAY FILE AN APPROPRIATE PETITION TO MODIFY THIS DECREE. AND VACATING IS A FORM OF MODIFICATION OF A DECREE AND 20 YEARS LATER WE ARE HERE. THAT'S WHAT WE ARE ASKING FOR, YOUR HONOR.

MR. BROOKS: YOUR HONOR, THESE PROVISIONS DO NOT CONFLICT WITH THE DECREE. THE REGULATIONS DO NOT PROHIBIT PHA FROM GIVING 10 DAYS NOTICE FOR EXAMPLE. THEY DON'T PROHIBIT PHA FROM DOING WHAT THE CONSENT DECREE REQUIRES, WHICH IS TO GIVE THE TENANT EXTRA NOTICE OF THESE IMPORTANT RIGHTS, LIKE THE RIGHT TO SEE DOCUMENTS.

IT IS IRONIC, PHA SHOULD TURN TO PARAGRAPH 13 TO TRY TO SUPPORT THEIR CASE BECAUSE IT UNDERMINES THEIR CASE.

PARAGRAPH 13 WAS OBVIOUSLY PUT IN THERE BECAUSE PHA, WHEN THEY WERE NEGOTIATING THE DECREE WAS AWARE THE REGULATIONS WERE COMING. THEY CHOSE TO SETTLE THIS CASE AND SETTLE IT IN A MANNER—

THE COURT: SUBJECT TO THE REGULATIONS.

MR. BROOKS: EXCUSE ME?

THE COURT: YOU SETTLED IT SUBJECT TO THE SUPREMACY OF THE REGULATION.

MR. BROOKS: CORRECT, YOUR HONOR. IF THERE WAS ANYTHING IN THE REGULATION WHICH FORBADE PHA FROM DOING IT, SOMETHING THAT THE CONSENT DECREE REQUIRES OR IF THERE WAS ANYTHING IN THE REGULATION THAT REQUIRED PHA TO DO SOMETHING THAT THE CONSENT DECREE DIDN'T REQUIRE, THEN THEY SHOULD FILE A MOTION BUT THERE'S NOTHING—THERE'S NO CONFLICT WHICH IS BETWEEN THE REGULATION AND THE CONSENT DECREE. THE CONSENT DECREE PROVIDES EXTRA PROTECTIONS. IT DOESN'T CONFLICT.

GETTING BACK TO THE EXTRA PROTECTIONS. I MEAN EVERY ONE OF THEM IS SIGNIFICANT. IN SOME CASES, FOR EXAMPLE, G ON PAGE 17, THE DECREE UNLIKE THE REGULATIONS REQUIRES THE HEARING DECISION BRIEFLY MENTION THE TENANT'S RIGHT TO APPEAL. AND CONSISTENT WITH THE CONSENT DECREE, THE DECISIONS THAT WE HAVE SEEN IN RECENT MONTHS AND RECENT YEARS DO THAT, THAT'S AN IMPORTANT RIGHT THAT THE TENANTS HAVE.

MANY TIMES THEY GO INTO THESE HEARINGS UNPREPARED FOR THE SERIOUSNESS OF THE SITUATION AND THE LEGAL COMPLEXITIES THAT CAN BE INVOLVED AND THEY DON'T REALIZE UNTIL AFTER THEY LOST THIS HEARING, THAT THEY REALLY SHOULD GET LEGAL HELP. PROBABLY HALF OF OUR SECTION 8 TERMINATION CASES COME TO US AFTER THE INITIAL HEARING WHEN THE TENANT SAYS, LOOK, I GOT THIS DECISION, IT SAYS HERE I CAN APPEAL. HOW DO I APPEAL?

SO, AGAIN, THE SIMPLE ADDITION OF A SENTENCE TO A HEARING DECISION PROVIDES AN IMPORTANT BENEFIT TO THE TENANTS AND THERE'S NOTHING IN THE HUD REGULATIONS THAT SAYS THERE'S ANYTHING WRONG ABOUT PUTTING IT IN THERE NOR DOES IT BURDEN PHA ANYTHING PUTTING SOMETHING IN A WORD PROCESSOR.

THE COURT: YOU SAY IT IS PUT IN THERE, YOU SAY BECAUSE OF THE DECREE.

MR. BROOKS: I KNOW OF NO OTHER REASON WHY IT WOULD BE PUT IN THERE. I DON'T KNOW WHY PHA WOULD BE FIGHTING SO HARD TO REMOVE, TO VACATE THE DECREE IF THEY DIDN'T WANT THE FREEDOM TO CHANGE THESE KINDS OF THINGS. THEY HAVE NOT POINTED TO ONE SINGLE PROBLEM THAT THIS DECREE CREATES.

THE COURT: ALL RIGHT.

LISTEN, I THINK I KNOW—I UNDERSTAND THE PROBLEM.

AND, I UNDERSTAND THAT, YOU KNOW, YOU ARE LOOKING AT IT FROM THE STANDPOINT THAT EVEN THOUGH NOTHING HAS HAPPENED UP TO NOW—WELL, NOTHING HAS HAPPENED THAT YOU CAN POINT TO, BUT YOU ASSUME THAT THINGS ARE GOING WELL BECAUSE OF THE DECREE, WHICH MAY OR MAY NOT BE THE CASE. YOU ARE TELLING ME THAT, BUT IT MAY OR MAY NOT BE THE CASE.

BUT, TO SAY IT IS DOING WELL, THEY ARE PROBABLY GOING WELL. THERE'S PROBABLY NOT A HECK OF A DIFFERENCE OF THE PHILOSOPHY OF PHA AND CLS RIGHT NOW. I CAN UNDERSTAND THAT THERE CAN BE BUT THERE PROBABLY ISN'T.

YOU ARE TELLING ME THAT. I UNDERSTAND THAT AND I UNDERSTAND YOUR FEAR THAT PHA WILL GO HOG WILD IF THERE IS NOT A DECREE THAT THEY THINK THEY CAN ENFORCE.

BY THE SAME TOKEN, IF IT IS REALLY A VIOLATION OF A RIGHT THAT SHOULD BE PROTECTED, THERE'S NO REASON WHY YOU CAN'T COME TO COURT TO GET PROTECTION.

MR. BROOKS: BUT, AGAIN, YOUR HONOR—

THE COURT: GET PROTECTION THAT WOULD PROHIBIT PHA FROM DOING IT IN THE FUTURE.

MR. BROOKS: A NUMBER OF THESE PROVISIONS OF THE DECREE GO BEYOND WHAT THE REGULATIONS REQUIRE. WE WOULD BE VERY HARD PRESSED TO WIN THEM AGAIN. THEY ARE VALUABLE. THEY DON'T CAUSE PHA ANY PROBLEMS. TO LOSE THEM FOR NO APPARENT REASON WOULD BE A MATTER OF GREAT CONCERN TO US, YOUR HONOR.

THE COURT: ALL RIGHT.

I UNDERSTAND THAT YOU MIGHT NOT WIN ON THE ISSUES THAT YOU GOT CONSENT TO INITIALLY.

I TOLD YOU THAT I PROBABLY AM LEANING TOWARD VACATING, BUT I HAVEN'T VACATED YET.

I WILL RECONSIDER CAREFULLY THE ARGUMENTS OF BOTH COUNSEL IN REGARD TO IT.

IN THE MEANTIME, THERE'S NO REASON WHY COUNSEL CAN'T COME TO SOME TYPE OF A RESOLUTION THEMSELVES. SOME OF THESE THINGS THAT YOU SAY DON'T NECESSARILY APPEAR, COULD APPEAR JUST AS EASILY AS NOT.

MR. BROOKS: YOUR HONOR, AGAIN, I DON'T KNOW WHAT THERE IS TO RESOLVE. I DON'T SEE PHA—

THE COURT: BECAUSE THERE NEVER WAS A PROBLEM. IF THERE WAS A PROBLEM, YOU WOULD HAVE BEEN HERE.

MR. BROOKS: EXCUSE ME.

THE COURT: SEE, CLS IS NOT BASHFUL ABOUT COMING TO COURT WHEN THERE IS A VIOLATION OF A CONSENT DECREE. THE REASON YOU HAVEN'T BEEN HERE, THERE IS NO SIGNIFICANT PROBLEM THAT I UNDERSTAND.

THERE ARE HYPOTHETICALS THAT YOU CAN CONJURE UP, THAT WOULD POSSIBLY BE A PROBLEM, BUT THERE HASN'T BEEN A PROBLEM.

MR. BROOKS: WE ARE NOT CONJURING HYPOTHETICALS, THEY ARE. I AM TRYING TO DESCRIBE AND CONTINUE IF IT IS FRUITFUL TO DESCRIBE REAL EVERYDAY SITUATIONS INVOLVING OUR CLIENTS, WHERE THESE RIGHTS ARE IMPORTANT.

THE RIGHT OF NOTICE TO APPEAL. THE RIGHT TO ADVANCED NOTICE OF THE RIGHT TO DISCOVER DOCUMENTS, TO THE RIGHT TO THE 10 DAYS NOTICE AS OPPOSED TO FIVE OR SEVEN DAYS NOTICE OF A HEARING DATE. EVERY ONE OF THESE IS IMPORTANT TO SIGNIFICANT NUMBERS OF OUR CLIENTS. AND, THESE ARE NOT HYPOTHETICAL PROBLEMS.

MS. FRENCH: WE ARE NOT DISAGREEING THAT THOSE ARE IMPORTANT THINGS TO YOUR CLIENTS. WE ARE SAYING—

MR. BROOKS: THEY ARE VALUABLE.

MS. FRENCH: PHA WILL ABIDE BY THE REGULATIONS.

MR. BROOKS: THEY ARE NOT IN THE REGS, YOUR HONOR. IF THEY ARE LEFT TO THE REGS, THEY WOULD BE FREE TO LEAVE THEM OUT. WE WOULD BE DELIGHTED TO WORK WITH STAFF COUNSEL AT PHA WHO ARE REASONABLE NOWADAYS. WE HAVE NOT ALWAYS ENJOYED THAT. WE WOULD HAVE NO ASSURANCE OF ENJOYING THAT IN THE FUTUR, WITHOUT THIS CONSENT DECREE.

THE COURT: YOU THINK—

MR. BROOKS: FRANKLY, IT HASN'T ALWAYS BEEN THAT WAY.

THE COURT: YOU THINK YOU BARGAINED FOR PERPETUAL PROTECTION FROM CHANGE OF PHILOSOPHY BY COUNSEL?

MR. BROOKS: I AM NOT SURE THAT THE ISSUES INVOLVED 10 DAYS NOTICE VERSUS SEVEN DAYS NOTICE VERSUS FIVE DAYS NOTICE ARE EVER CHANGING, YOUR HONOR.

IF ANYTHING, THE FACT THAT SO MANY MORE OF OUR CLIENTS ARE WORKING NOWADAYS, HAVE CHILDREN IN CHILD CARE, MAKES THE 10 DAY NOTICE BEFORE THE HEARING MORE IMPORTANT THAN EVER BEFORE.

TWENTY YEARS AGO, A VAST MAJORITY OF SECTION 8 PEOPLE WERE ON WELFARE. THEY COULD SHOW UP AT A HEARING WITH THEIR KIDS, IF NECESSARY, WITH FIVE DAYS NOTICE. NOW, MOST OF THESE PEOPLE—MANY, PROBABLY MOST ARE WORKING AT LEAST PART-TIME, HAVE KIDS IN CHILD CARE, THEY NEED THIS KIND OF NOTICE.

THESE ARE PERRENIAL ISSUES, YOUR HONOR. IN THE ABSENCE OF ANY REAL PROBLEM, I SEE NO REASON TO HAMSTRING THE PLAINTIFFS BY SAYING, WELL, YOU CAN ALWAYS BRING A LAWSUIT, BUT YOU PROBABLY WOULD HAVE A HARD TIME WINNING AND IN THE MEANTIME, YOU KNOW, THAT WAS THE BARGAIN, BUT YOU HAVE GOTTEN A GOOD RUN. IT IS ALL OVER NOW.

IF THAT WAS PART OF THE BARGAIN, THERE SHOULD BE A SUNSET IN THIS THING. IF THEY PROPOSED A SUNSET, WE MIGHT HAVE TAKEN IT. WE MIGHT HAVE NOT. WHO KNOWS WHAT WOULD HAPPEN BACK IN 1982 OR '3, PERHAPS YOUR HONOR.

CERTAINLY—

THE COURT: TWENTY-THREE YEARS AGO, IF THEY PROPOSED A SUNSET, YOU WOULD HAVE TAKEN IT?

MR. GOULD: IF I MAY YOUR HONOR, I AM GEORGE GOULD.

I WAS COUNSEL WHO NEGOTIATED THE SETTLEMENT IN THIS CASE MANY, MANY YEARS AGO.

AND, WE GAVE UP A FAIR AMOUNT. WE HAD A VERY GOOD DAMAGE CLAIM FOR DENYING TENANTS DUE PROCESS.

AT THE TIME THE—I SPECIFICALLY REMEMBER THE TIME THAT THE SETTLEMENT WAS ACCEPTED, THERE WERE PROPOSED REGS OUT THERE, FAIRLY GENERAL AND SOMEWHAT SIMILAR TO WHAT HUD CAME OUT WITH. THE FINAL REGS IN TURN FOR US GIVING UP VARIOUS CLAIMS, INCLUDING DAMAGES, WE NEGOTIATED AN AGREEMENT WITH PHA, WHICH PUT SOME MEAT ON THE SETTLEMENT.

BUT, MR. BROOKS HAD TALKED ABOUT SPECIFYING WHAT A REASONABLE NOTICE IS, TEN DAYS. TALKING ABOUT MAKING SURE THAT TENANTS KNEW OF THEIR RIGHTS. THE RIGHT TO DISCOVERY. THE RIGHT TO APPEAL AND THINGS LIKE THAT.

AND, I GUESS WHAT CONCERNS US IN THE FUTURE, THAT IF WE SEE THAT WE WILL ENTER INTO SETTLEMENTS WITH PHA, THEN FIVE, 10, 15, 20 YEARS LATER THEY WILL DISAPPEAR, WE WILL BE RELUCTANT TO DO SETTLEMENTS SIMPLY BECAUSE WE KNOW WE ARE GIVING THINGS UP.

THE COURT: YOU WILL NEVER GET A SETTLEMENT, IF YOU TELL SOMEONE THEY ARE BINDING ALL ADMINISTRATIONS FOREVER.

MR. GOULD: THE POINT IS—

THE COURT: BASICALLY PEOPLE THAT ARE THEN TALKING TO YOU ABOUT SETTLEMENT, THEY ARE THINKING ABOUT REASONABLE TIMES. I THINK YOU WERE TOO AT THAT TIME. IF ANYBODY HAD TOLD YOU THAT YOU WOULD BE IN COURT NOW 20 SOME YEARS LATER ARGUING THIS QUESTION, YOU WOULD HAVE—

MR. GOULD: I THINK THE SETTLEMENT, THE WAY THAT IT WAS SET UP, AND OUR EXPERIENCE WITH SETTLEMENTS; YES, ADMINISTRATIONS CHANGE. AND, YES, PROCESSES CHANGE. YES, PROBLEMS CHANGE.

I THINK OUR POINT IS THAT IN THIS PARTICULAR CASE, IF PHA HAS PARTICULAR PROBLEMS WITH THE SETTLEMENT, THEY CLEARLY ARE FREE TO COME TO US; IF WE CAN'T AGREE, COME TO COURT, THIS IS NOT RIGHT ANYMORE, THIS SETTLEMENT LOST

ITS VITALITY IN THIS PARTICULAR AREA. WE NEED TO CHANGE IT. TIMES HAVE CHANGED, BUT THAT'S NOT WHAT THEY ARE DOING. THEY WANT TO THROW OUT EVERYTHING.

WE AGREE THAT A SETTLEMENT ENTERED 20, 25 YEARS AGO MAY NEED CHANGE. IT MAY NEED TO BE TWEAKED. SOMETHINGS MAY NEED TO BE CHANGED. THE SECTION 8 PROGRAM MAY CHANGE, A LOT OF THINGS MAY CHANGE.

THERE'S A WHOLE PROCESS IN MANY OF OUR OTHER CASES, WE DO A LOT OF CASES—

THE COURT: THE WHOLE STATUS OF YOUR SECTION 8 TENANTS HAVE CHANGED.

MR. GOULD: EXCUSE ME?

THE COURT: THE ARGUMENTS, I HEARD, THE WHOLE STATUS OF YOUR SECTION 8 TENANTS HAVE CHANGED FROM THOSE THAT WERE ALMOST ALL ON PUBLIC ASSISTANCE TO THOSE THAT ARE NOW EMPLOYED.

MR. GOULD: MANY MORE ARE EMPLOYED.

THE COURT: THINGS DO CHANGE. I COULDN'T IMAGINE YOUR HAVING GOTTEN AN AGREEMENT, IF YOU TRIED TO EXPRESSLY PUT IN THERE, FOREVER.

MR. GOULD: THE POINT IS THAT THERE ARE DUE PROCESS REQUIREMENTS THAT ARE NEEDED.

THE COURT: THE DUE PROCESS REQUIREMENTS WILL BE THERE, WHETHER YOU GET THE CONSENT DECREE OR NOT.

MR. GOULD: THAT IS CORRECT. WHAT WE GAVE UP AT THE TIME OF THE SETTLEMENT, WE THINK IT IS VERY IMPORTANT IS VARIOUS THINGS THAT WE

COULD HAVE SUED PHA AND GOT—GAVE THEM UP IN RETURN FOR KNOWING WE HAD THE ADDED PROTECTIONS THAT TENANTS WILL BE PROTECTED AS MR. BROOKS SAID.

OUR CONCERN NOW IS THAT AFTER MANY YEARS, AFTER PHA AND WE HAVE HAD PROBLEMS, I THINK IT IS VERY IMPORTANT FOR THE COURT, THAT WE HAVE HAD PROBLEMS IN INDIVIDUAL CASES. GENERALLY WHAT WE DO IS WORK IT OUT WITH PHA. IF THE TENANT DOESN'T GET THE PROPER NOTICE OR IF THE SECTION 8 OFFICE DOES SOMETHING IMPROPERLY, WE WILL WORK IT OUT. OUR FIRST STEP IS NOT TO GO TO THE OFFICE—NOT TO GO RIGHT TO COURT.

INRONICALLY IN THIS CASE, PHA NEVER CAME TO US. THEY WENT RIGHT TO COURT. WE NEVER HAD A LETTER, NEVER GOT ANYTHING SAYING, YOU KNOW, WE ARE OPERATING UNDER THE SECTION 8 PROGRAM. WE ARE HAVING THE FOLLOWING PROBLEMS. THE ONLY THING THAT WE EVER GOT WAS A MOTION TO VACATE THE DECREE.

WE THINK THAT IF PHA HAS PROBLEMS, WHAT THEY NEED TO DO IS SPECIFY WHAT THE PROBLEMS ARE WITH THE DECREE, WHY THEY ARE NOT MANAGEABLE, WHY THEY ARE NOT WORKABLE AND NEGOTIATE WITH US AND IF WE CAN'T, PRESENT THAT TO THE COURT. THEY HAVEN'T PRESENTED ANYTHING, WHICH SAYS THAT THIS DECREE IS NOT WORKABLE.

MS. FRENCH: YOUR HONOR, IF I MAY, THERE IS SOMETHING, I TRIED HARD NOT TO INTERRUPT.

THE COURT: YOU CERTAINLY MAY.

MS. FRENCH: WHAT COMMUNITY LEGAL SERVICES IS SUGGESTING THAT A DEAL IS A DEAL. A CONSENT DECREE, IT SHOULD GO ON FOREVER—

THE COURT: NO. IT SUGGESTS THAT IT BARGAINED FOR THESE.

MS. FRENCH: CORRECT.

THE COURT: IT GAVE UP SOMETHING IN RETURN FOR ANTICIPATING THAT IT WAS GOING ON AT LEAST FOR AN INDEFINITE PERIOD IN THE FUTURE.

MS. FRENCH: CORRECT. WHAT IN FACT THEY BARGAINED FOR, IF REGULATIONS WERE ENACTED, THOSE REGULATIONS WOULD CONTROL. THAT'S EXPRESSLY SET FORTH IN PARAGRAPH 13 OF THE DECREE ITSELF.

MOREOVER, WHAT THEY ARE ARGUING, IS THAT INSTITUTIONAL REFORM—CONSENT DECREES SHOULD GO ON FOREVER. THAT'S DIRECTLY CONTRARY TO WHAT THE UNITED STATES SUPREME COURT SAID IN THE FREW CASE LAST YEAR AND THE THIRD CIRCUIT SAID IN HARRIS VERSUS CITY OF PHILADELPHIA AND IN OTHER CASES. ONCE THE PROBLEM IS FIXED, CONTROL AND DECISION-MAKING SHOULD BE RETURNED TO THE STATE OFFICIALS IN CHARGE OF THE AGENCY IN QUESTION.

HERE, THEY CONCEDED THAT THERE REALLY HAVEN'T BEEN ANY PROBLEMS IN THE LAST 20 YEARS. THEY HAVE NOT FILED ANY MOTIONS. THE PROBLEM THAT WAS INITIALLY SOUGHT TO BE CURED BY THIS CONSENT DECREE WAS IN FACT CURED AT THE TIME IT WAS ENTERED INTO. THERE WERE NO REGULATIONS THAT HAD BINDING LEGAL EFFECT A YEAR AND A HALF LATER. HUD

PUBLISHED THOSE REGULATIONS AND THEY TOOK EFFECT, AND FOR A YEAR AND A HALF WHERE THERE WERE NO REGULATIONS, THIS CONSENT DECREE CONTROLLED.

SINCE THEN, THE CONSENT DECREE HAS REMAINED IN EFFECT BUT THE DECREE ITSELF PROVIDES THAT IF REGS ARE ENACTED, THE REGS SHOULD CONTROL. THAT'S WHAT WE ARE ASKING FOR.

THIS COURT AND THIS INSTITUTIONAL REFORM LITIGATION AGAINST PHA, BECAUSE THERE'S NO LONGER ANY NEED FOR IT, IT HAS BEEN A SIGNIFICANT CHANGE.

THE COURT: IF YOU HAVE REGS THAT SAY REASONABLE NOTICE?

MS. FRENCH: THAT IS CORRECT.

THE COURT: THE CONSENT DECREE THAT SAYS 10 DAYS NOTICE, DOES THAT MEAN THAT THE 10 DAYS IS GOOD MINIMUM NOTICE?

MS. FRENCH: WELL, IT SEEMS TO ME THAT SINCE THIS COURT HELD THAT 10 DAYS IS REASONABLE NOTICE, IT WOULD BE WISE FOR PHA TO CONTINUE TO GIVE 10 DAYS, IT HAS THE LEGAL IMPRIMATUR OF REASONABLE NOTICE. REASONABLE IS THE TERM USED UNDER THE REGULATIONS.

MR. BROOKS: YOUR HONOR, I DON'T WANT TO INTERRUPT THE COLLOQUY. IF I CAN MAKE A COUPLE OF POINTS.

WITH RESPECT TO FRU, I'LL READ THE LAST TWO SENTENCES OF THE COURT'S OPINION. IF THE STATE ESTABLISHES REASON TO MODIFY THE DECREE, THIS IS THE FRU CASE, INSTITUTIONAL

REFORM, THE COURT SHOULD MAKE THE NECESSARY CHANGES.

THE COURT: THEY SAY IF THEY HAVE NOT, YOU ANTICIPATED IN THE ADOPTION OF REGULATIONS, THAT THE REGULATIONS WOULD CONTROL.

IF THE REGULATIONS CONTROL, THERE'S NO REASON TO CONTINUE THE CONSENT DECREE.

MR. BROOKS: I DON'T THINK WITH ALL DUE RESPECT, I DON'T THINK THAT'S WHAT THE FREW COURT WAS TALKING ABOUT.

THE COURT: I THINK THAT'S THE ARGUMENT. I THINK. IF THE REGULATIONS CONTROL, THERE'S NO REASON TO CONTINUE THE CONSENT DECREE UNLESS THERE IS SOMETHING IN THE CONSENT DECREE WHICH IS PERHAPS WIDELY AT VARIANCE WITH THE REGULATIONS, WHICH CONCEIVABLY THERE COULD BE. BUT, YOU KNOW, I AM TRYING TO UNDERSTAND WHAT IT IS.

MR. BROOKS: YOUR HONOR, THE FRU COURT HELD THE STANDARD IS THAT THE STATE OR IN THIS CASE PHA MUST ESTABLISH SOME REASON TO MODIFY THE DECREE, SHOW SOME PROBLEM WITH THE DECREE.

THE COURT: THEY ARE NOT MODIFYING. THEY WANT TO VACATE IT BECAUSE THERE ARE REGULATIONS WHICH NOW CONTROL.

MR. BROOKS: BUT, THE POINT I AM TRYING TO—

THE COURT: THEY ARE NOT ASKING TO CHANGE THE 10 DAYS TO EIGHT DAYS. THEY ARE NOT ASKING TO CHANGE ANY PROVISION IN THERE TO SOMETHING LESS THAN WHAT HAS BEEN THE PRACTICE. THEY ARE NOW SAYING WE HAVE REGULATIONS NOW WHICH CONTROL ANYWAY,

PURSUANT TO THE DECREE. LET US CONTINUE WITH THOSE REGULATIONS WITHOUT THE DECREE.

MR. BROOKS: YOUR HONOR, THE REGULATIONS SIMPLY DO NOT CONTAIN THE RIGHTS THAT I HAVE LISTED IN PAGES 16 TO 18. WE ARE–IN TERMS OF THE OVERALL TEST HERE, I'LL TURN TO A CASE THAT INVOLVED ANOTHER OLD CONSENT DECREE, ONE WE LOST, THE BROWN DECREE. I FIND IT IRONIC THAT PHA TRIES TO RELY ON THIS BECAUSE THE THIRD CIRCUIT AND I QUOTE THIS AT PAGE 15 OF OUR REPLY, OUR ANSWER, SPEAKING OF THE BROWN DECREE IN THE REGULATIONS: OUR REVIEW OF THE FEDERAL STATUTE AND REGULATIONS PROMULGATED AFTER THE CONSENT DECREE WAS ENTERED REVEALS THAT NOT ONLY DID THEY SIGNIFICANTLY CHANGE THE RELEVANT DUE PROCESS LANDSCAPE (ORIGINALLY SOUGHT TO BE CURED BY THE CONSENT DECREE) BUT THAT THEY GAVE BROADER AND MORE COMPREHENSIVE PROTECTION TO THE PUTATIVE CLASS MEMBERS THAN HAD BEEN AVAILABLE UNDER THE DECREE. THUS, THE BROWN DECREE NO LONGER HAD FORCE OR UTILITY, AND THERE WAS NO REASON FOR IT TO REMAIN OPERATIVE.

THE TEST HERE, DO THE REGULATIONS COVER THE SAME AREA, ARE THEY BETTER THAN THE DECREE? DOES THE DECREE CONTINUE TO OFFER SOMETHING THAT THE REGS DO NOT?

HERE CLEARLY THIS DECREE OFFERS A NUMBER OF THINGS WHICH ARE BETTER FOR THE TENANTS. IT HAS—

THE COURT: IF THEY HAVE 10 DAYS AS THE MINIMUM RATHER THAN THE REQUIRED NOTICE STANDARD, THEY WOULD HAVE IMPROVED UPON THE NOTICE, WOULD THEY NOT?

MR. BROOKS: YOUR HONOR, I FAIL TO UNDERSTAND WHY THAT IS EVEN A RELEVANT ISSUE BECAUSE IF PHA DIDN'T WANT TO CHANGE SOME OF THESE THINGS, WHY IN THE WORLD WOULD THEY BE IN HERE TO ASK TO VACATE THE DECREE.

MORE PARTICULARLY, WHY WOULDN'T THEY HAVE SIMPLY COME TO US.

THE COURT: FOR THE SAME REASON EVERYTHING HAPPENS, YOU GET INQUIRIES FROM ADMINISTRATIVE OFFICES OR FROM HUD AND SO FORTH, THEY WANT TO KNOW WHAT'S THE VITALITY OF THIS PARTICULAR MATTER, WHICH HAS BEEN ON YOUR DOCKET SINCE 1900 AND YOU THEN LOOK AT IT AND SAY, THERE'S NO VITALITY TO IT. LET ME GET RID OF IT.

I UNDERSTAND THAT PROBLEM.

MR. BROOKS: BUT, THE FIRST PART—EXCUSE ME. THE FIRST PART OF THAT IS NOT TRUE. THERE IS VITALITY TO IT. THAT'S EXACTLY WHY THEY WANT TO GET RID OF IT.

THE COURT: I UNDERSTAND THAT'S YOUR ARGUMENT, THAT THERE IS VITALITY TO IT. I'LL LOOK AT IT AGAIN.

MR. BROOKS: I FAIL TO SEE WHY AN AGENCY WOULD BE SEEKING TO GET RID OF A DECREE, IF IT INTENDS TO CONTINUE DOING EVERYTHING THAT THE DECREE REQUIRES ANYWAY. IT MAKES NO SENSE.

THE COURT: I TAKE IT, CLS GETS RID OF A LOT OF OPERATING PROCEDURES AND SO FORTH THAT HAVE NO VITALITY.

MR. BROOKS: THIS ONE HAS VITALITY.

THE COURT: IF THEY HAVE MONEY TO HIRE SOMEONE WITH EXPERTISE IN THAT REGARD REFORMING THE PROBLEMS, THEY GO ABOUT REFORMING THE PROCESS.

I MEAN THE QUESTION IS WHETHER IT CONTINUES TO HAVE SOME REASON TO HAVE VITALITY.

MR. BROOKS: EXACTLY.

THE COURT: WHETHER THAT IS SO OR NOT, I'LL LOOK AT IT AGAIN.

MR. BROOKS: THANK YOU, VERY MUCH, YOUR HONOR.

MS. FRENCH: THANK YOU, YOUR HONOR.

MR. GOULD: THANK YOU, YOUR HONOR.

THE COURT: WE ARE IN RECESS.

(HEARING ADJOURNED AT 12:10 P.M.)

* * * *

(2)

Supreme Court, U.S.
FILED
JUL 27 2007
OFFICE OF THE CLERK

No. 06-1507

In the Supreme Court of the United States

PHILADELPHIA HOUSING AUTHORITY,
Petitioner,

v.

VANESSA HENDERSON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

GEORGE D. GOULD, ESQ.
Counsel of Record
PAUL A. BROOKS, ESQ.
COMMUNITY LEGAL SERVICES, INC.
1424 CHESTNUT ST.
PHILADELPHIA, PA 19102
(215) 981-3700

Counsel for Respondents

July 27, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Question Presented for Review

While the parties to this Consent Decree were negotiating its terms, HUD proposed regulations which, like the Decree, concerned the due process rights of respondents (tenants subsidized through the "Section 8" program). The parties, plainly anticipating that HUD would promulgate final regulations after entry of the Decree, included this paragraph:

> ¶13. Should [HUD] promulgate regulations which require PHA [petitioner] to perform acts which are inconsistent with this [Decree] or which prohibit PHA from performing acts consistent with [it], such regulations shall govern . . . [and] either party shall file an appropriate petition to modify this decree. . . .

About one year after the Decree was entered, HUD did promulgate final regulations. Neither party sought to modify the Decree until, twenty years later, petitioner asked the district court to vacate it entirely.

The question presented is: considering the uncommon events which prompted ¶13, and construing that paragraph properly, should the Decree be respected – rather than vacated – where petitioner has not shown, as required by ¶13, that continued compliance with the Decree interferes with its ability to conform to the final regulations, which the parties had anticipated; nor has petitioner shown that requiring continued compliance is inequitable; and where the Decree still enhances the respondents' procedural rights?

List of Parties

Respondents incorporate by reference petitioner's List of Parties, except that pursuant to Fed. R. Civ. P. 25(d) the individual defendants have been replaced by the individuals who presently hold the public offices they once held.

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Statement of the Case

The Court of Appeals clearly and accurately stated the case in section "I" of its opinion (*see:* Appendix[1] pp. 2a-6a), which respondents ("Tenants") incorporate by reference herein. To it Tenants add that the Court of Appeals subsequently denied rehearing, and this petition for *certiorari* was then filed by PHA.

The statement of the case by petitioner ("PHA") is marred by misleading assertions, most notably PHA's claim that the Court of Appeals required the Consent Decree to continue "in perpetuity." To the contrary, the Court of Appeals said nothing of the sort. Rather, it held that HUD's promulgation of final regulations 23 years ago, as anticipated by the parties at that time and provided for in the Decree, does not in and of itself justify PHA's present motion – filed "like a bolt out of the blue" – to vacate the Decree. App. p. 8a. The Court further held that PHA failed to meet its burden of showing that preserving the Decree would be inequitable. App. p. 9a. The Court, of course, did not rule out the possibility that some future event may justify modifying or even vacating the Decree.

PHA's statement of the case omits significant facts, in particular: the existence and terms of ¶13 in the Decree, and that before the Decree was entered HUD published proposed regulations. PHA's omissions defy reason, because the Court of Appeals correctly found that the inclusion of that paragraph, and the proper construction of it, were crucial factors in deciding the case.

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[1] By the "appendix," respondents mean the appendix filed by petitioner PHA.

Furthermore, PHA's statement of the case fails to mention that the Decree includes several provisions which provide Tenants with greater, or at least more specific, protections than do HUD's final regulations. The Court of Appeals summarized most of these provisions.[2] App. p. 5a.

Reasons for Denying the Petition

PHA's primary argument with the Court of Appeals' decision is entirely mis-directed because PHA fails to engage the foremost issue: the proper construction of the Consent Decree. One cannot determine whether "the objects of the decree have been attained . . . ," as PHA asserts they have since HUD promulgated final regulations, until one has construed the Decree correctly to determine what those objects are. *Frew v. Hawkins,* 540 U.S. 431, 442, 124 S. Ct. 899, 906 (2004). The Court of Appeals correctly construed the Decree to find that its object was to provide Tenants with *enduring* protections, not just temporary ones.

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[2] To the Court of Appeals' list of the Decree's benefits another should be added. HUD's regulation provides that, in most types of appeals, "the *PHA must give the opportunity for an informal hearing before the PHA terminates* housing assistance payments for the family . . . ." 24 C.F.R. § 982.555(a)(2) (emphasis added). App. p. 15a.

The Decree provides: "Section 8 payments shall continue *until a final decision of the hearing officer is rendered.*" ¶4 (emphasis added). App. p. 38a. When a Tenant requests an informal hearing, therefore, HUD's regulation requires that benefits continue at least until the hearing itself, but the regulations are unclear about whether benefits must continue after the hearing until the time when a (written) decision is rendered; the Decree unambiguously requires that benefits continue until the decision is rendered.

Furthermore, PHA ignores a key fact which this Court has held usually dictates that a consent decree be preserved. "Ordinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385, 112 S. Ct. 748, 760 (1992). The Court of Appeals, construing ¶13 of the Decree, correctly decided that it reflected the parties' anticipation that HUD would soon promulgate final regulations. PHA cannot rely upon the promulgation of final regulations as the basis for vacating the Decree because the parties *anticipated* those regulations.

The supposed inter-Circuit conflict which PHA asserts the Third Circuit created with its decision, in the light of day proves to be readily explainable. The "negative impact" that PHA claims the decision has on its own ability to administer the Section 8 program, is unproven and, at worst, minor. PHA failed to present evidence to the district court that the Decree imposes any significant burden upon it. Any adverse impact upon other governments and agencies is entirely speculative.

A. The Court of Appeals correctly construed the objects of the Decree and determined the parties had anticipated that HUD's final regulations would not render the Decree unnecessary.

The Court of Appeals correctly construed the Decree and determined that the district court's order vacating the Decree rested on an unsound foundation: a mis-construction of the Decree. The district court erroneously held that the parties intended the Decree merely to provide Tenants with due process until HUD promulgated final regulations. App. p. 12a. But ¶13 of the Decree, the Court of Appeals observed,

belies the district court's construction of the Decree. That paragraph, viewed in light of HUD's pre-Decree proposal of regulations, manifests the parties' anticipation that HUD will promulgate final regulations and provides expressly for the Decree to continue afterward, unless – and to the extent that – the final regulations require PHA to perform acts which are inconsistent with the Decree or prohibit PHA from complying with provision(s) of the Decree. In either event, ¶13 states that the Decree is then to be modified, not vacated altogether.

Petitioner's brief is remarkable for the complete absence of analysis of ¶13 or of the other provisions of the Decree. PHA claims that the purposes of the Decree have been met, but never engages the text of the Decree to ascertain what those purposes are. Such disregard for the text of the Decree explains petitioner's citation to precedents which are distinguishable from this case, and its histrionic claim that the Third Circuit's ruling will have a substantial impact beyond this case itself.

The Court of Appeals correctly applied *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748 (1992) to this case. In *Rufo* this Court held:

> a party seeking modification of a consent decree bears the burden of establishing that a *significant change in circumstances warrants* revision of the decree. If the moving party meets this standard, then the court should consider whether the proposed modification is suitably *tailored* to the changed circumstances.

Rufo, 502 U.S. at 383-84, 112 S. Ct. at 760 (emphases added).

In *Rufo* this Court discussed in particular the standard for modifying consent decrees which govern state or local governments. Contrary to PHA's argument, *Rufo* did not hold that a decree against a government agency should be vacated whenever any subsequent change in the law occurs. Rather, *Rufo* (as the Third Circuit noted) rebuts PHA's argument that HUD's promulgation of final regulations justifies vacating the Decree, because the parties anticipated that event. This Court stated in *Rufo*: "[o]rdinarily, however, modification should not be granted where a party relies upon events that actually were *anticipated* at the time it entered into a decree." *Rufo*, 502 U.S. at 385, 112 S.Ct. at 760 (emphasis added). Because the parties, as evidenced by ¶13, anticipated when the Decree was entered that HUD would promulgate final regulations, the Third Circuit correctly ruled that HUD's promulgation of them, as expected, does not warrant vacating the Decree.

PHA's reliance upon *Frew v. Hawkins*, 540 U.S. 431, 124 S.Ct. 899 (2004) is ill-considered. This Court stated in *Frew*:

> The federal court must exercise its equitable powers to ensure that *when the objects of the decree have been attained*, responsibility for discharging the State's obligations [under federal law] is returned promptly to the State and its officials.

540 U.S. at 442-43, 124 S.Ct. at 906-07 (emphasis added). The threshold question under *Frew*, therefore, is: what are the objects of the decree?

The Third Circuit correctly construed the Decree to have objectives beyond just serving as a "temporary stopgap." App. p. 6a. The Decree contains a number of provisions which, while consistent with HUD's proposed and final

regulations, go beyond those to provide Tenants with additional benefits. *See* Court of Appeals opinion, App. p. 5a; and *supra*, note 2. The Decree was intended to provide Tenants with those additional benefits indefinitely. It follows, therefore, that the objects of the Decree were not attained as soon as HUD promulgated final regulations, nor have all the objects of the Decree been attained since then.[3]

Contrary to PHA's assertion, the Third Circuit's holding that the Decree was intended to survive the promulgation of

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[3] PHA suggests that it complied fully with the Decree throughout the twenty-plus years it was in force. PHA pet. p. 13. This suggestion is artfully couched and deceptive. It is true that Tenants never filed a motion to enforce the Decree. But the absence of a motion to enforce the Decree does not necessarily mean PHA always complied with it. Many factors must be considered when a plaintiff decides whether and when to move to enforce a consent decree, and some of those factors are not related to defendant's compliance. For example, as Tenants explained to the Court of Appeals (Brief to 3d Cir., p. 33): for a long period of time, PHA did not record testimony given at informal hearings regarding Section 8 terminations. In the absence of recorded testimony from an administrative hearing, under Pennsylvania law appellants (including Section 8 tenants) are entitled to a *de novo* trial in Pennsylvania's Court of Common Pleas. *See* 2 Pa.C.S.A. § 754. When a *de novo* trial is available on appeal, procedural errors in an administrative hearing are relatively harmless. So Tenants had little incentive to move to enforce certain aspects of the Decree. Another factor is whether PHA was receptive to correcting violations of the Decree informally on a case-by-case basis. Plaintiffs acknowledged during oral argument before the district court that in recent years PHA's staff counsel were receptive to informal requests. But that was not always the case. Without the Decree, PHA would no longer have an incentive informally to resolve problems that could have been avoided were the Decree still in force.

final regulations, is not tantamount to holding the Decree must be maintained *in perpetuity*. If a significant change in the factual or legal circumstances occurs which makes continued enforcement of one or more provisions in the Decree problematic for PHA, then – and only then – may equitable relief from the Decree be warranted. Even in that event, however, any relief would have to be "tailored," as *Rufo* puts it, to address the problem. 502 U.S. at 383-84, 112 S. Ct. at 760.

Frew reiterates *Rufo's* statement that the burdens a consent decree places upon state and local governments in carrying out their functions, are more than "marginally relevant" when modification of the decree is proposed. 540 U.S. at 442, 124 S. Ct. at 906-07, *citing Rufo*, 502 U.S. at 392 n.14, 112 S. Ct. at 764-65. But the Court did not go as far in *Frew* as PHA suggests it did. "*If the State establishes reason to modify the decree*, the court should make the necessary changes; *where it has not done so, however, the decree should be enforced according to its terms.*" *Frew, supra* (emphases added). *Frew* is consistent with *Rufo*, which explained the rule this way:

> The concurrence mischaracterizes the nature of the deference that we would accord local government administrators. As we have stated, *the moving party bears the burden* of establishing that a significant change in circumstances *warrants modification of a consent decree. No deference is involved in this threshold inquiry.* However, once a court has determined that a modification is warranted, we think that principles of federalism and simple common sense require the court to give significant weight to the views of the local government officials who must implement any modification.

Rufo, 502 U.S. at 393, n.14, 112 S. Ct. at 764 (emphases added; internal citation omitted).

Here, PHA failed to show that continued compliance with the Decree places any undue burden upon it – that the change in the law effected by promulgation of final regulations *warrants modification of the Decree.* Of course, compliance with the Decree – like compliance with HUD's final regulations (and with the 5th and 14th Amendments) – burdens PHA to some extent. But that burden is not sufficient to warrant modifying the Decree. PHA had to show, under *Frew* as well as under *Rufo*, that its continued compliance with the Decree placed a significant burden upon it, beyond that burden imposed by HUD's regulations.

PHA's argument boils down to an assertion that it would prefer not to have the Decree around any longer. *See:* PHA pet. pp. 18-19, and § C *infra,* pp. 12-14. But *Rufo* counseled: "Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree. . . ." 502 U.S. at 383-84, 112 S. Ct. at 760.

Not only does PHA misinterpret *Frew,* it ignores a number of key factual differences between *Frew* and the case at bar. Unlike the federal-state Medicaid program at issue in *Frew*[4], the Section 8 program that PHA operates is and

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[4] *Frew* involved the Medicaid program, "a cooperative federal-state program that provides federal funding for state medical services to the poor." 540 U.S. at 434, 124 S. Ct. at 901. "In contrast with the federal statute's brief and general mandate, the decree [at issue in *Frew*] required state officials to implement many specific proposals." 540 U.S. at 435, 124 S. Ct. at 902-03. Apparently,

always has been primarily a *federal* one. Established by a 1974 amendment to the U.S. Housing Act, having detailed federal statutory requirements and regulations, and funded entirely by the federal government, the program must be operated pursuant to federal law and detailed substantive regulations. PHA's role in the Section 8 program is to operate it within Philadelphia as directed by federal law.[5]

The decision in *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 111 S. Ct. 630 (1991) also must be distinguished. *Dowell* involved not a *consent* decree, but a decree entered after the district court held hearings and found that the public schools were unconstitutionally segregated. *Id.* at 241, 111 S. Ct. 633. The decree in *Dowell* imposed a detailed desegregation plan upon the local school district. Here, the Consent Decree treads much less heavily upon the local agency, PHA. Furthermore, this Court limited its decision in *Dowell* to school-desegregation cases:

> Considerations based on the allocation of powers within our federal system, we think, support our view that the quoted language from *Swift* [requiring a showing of "grievous wrong evoked by new and unforseen conditions" to release a defendant from a decree] does not provide the proper standard to apply *in school desegregation cases. Such decrees*, unlike

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no federal regulations fleshed-out the statute's brief and general mandate (the Court mentioned none).

[5] The Section 8 program has even less state or local character than does PHA's public housing program, which is not covered by this Decree (it was PHA's public housing program that was at issue in *Brown v. PHA*, 350 F.3d 338 (3d Cir. 2003)). For example, PHA does not own the housing units in the Section 8 Program.

> the one in *Swift*, are not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs. . . .

498 U.S. at 248-49, 111 S. Ct. at 637-38 (emphasis added). Those considerations do not apply here, or at least they do not apply to a comparable decree, because the Section 8 program is at bottom a federal one.

One could hardly cite another federal program that involves state or local government in any way, which places less financial burden on the state or local agency than does the Section 8 program. Indeed, PHA concedes in its petition that "this particular Consent Decree does not require active court involvement in the day-to-day administration of PHA . . . ." PHA brief p. 18.[6]

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[6] PHA's argument, at p. 14, that "protecting the parties 'bargain' is peculiarly inappropriate . . ." because this is a class action, evinces PHA's fundamental confusion about, and perhaps hostility toward, class actions generally. Because the plaintiff class was certified, on Nov. 26, 1982, to include both Section 8 Tenants at that time and those who "may in the future be Tenants under Section 8 . . . ," App. p. 21a, it makes no difference whether the original named plaintiffs remain in the class. Today's class members have just as much right to enjoy the advantages of the Decree, as the original class members did.

Respondents also note that they cannot find this argument in PHA's briefs to the Third Circuit and, therefore, respondents suggest that PHA be deemed to have waived it.

B. The Third Circuit's decision does not conflict with the Eleventh Circuit's pre-*Rufo* decision *Hodge v. Dep't H.U.D.*; in the alternative, the *Hodge* decision does not reflect this Court's current precedents.

Straining to create the appearance of conflict between circuit courts, PHA asserts the Third Circuit's decision here conflicts with an 18-year-old, pre-*Rufo* decision of the Eleventh Circuit: *Hodge v. Dep't of H.U.D.*, 862 F.2d 859 (11th Cir. 1989). That assertion is without merit. *Hodge* must be distinguished because in *Hodge* (A) HUD had not published proposed regulations before the decree was entered; (B) the consent decree evidently contained nothing akin to ¶13 of the Decree here, and (C) there is no other indication the parties in *Hodge* anticipated the promulgation of regulations and made specific provision in the decree for them.

The circuit court in *Hodge* apparently failed to anticipate fully this Court's holding in *Rufo*. The *Hodge* court criticized the consent decree "because [it] mandates special notice requirements not imposed by Congress or HUD." *Id.* at 865. Without explanation, the *Hodge* court stated that the presence of "special notice requirements" in the decree put it in "conflict" with HUD's subsequent regulations and that the "conflict" warranted vacating the decree, unless the tenants could show the regulations did not satisfy the constitutional minimum for due process.[7] Insofar as *Hodge* may be read to

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[7] *Hodge* concerned procedures required when the housing authority sought to charge a tenant for the cost of repairing damage to a unit. Both the consent decree and the subsequent federal regulation required the authority to give the tenant advance notice of the cost and the authority's intent to charge her for it, and both provided her with the opportunity for a grievance hearing to dispute it. The decree, unlike the regulation, further required that the authority's

justify vacating a consent decree merely because it provides for more than the minimum required by the Constitution and more than the minimum provided by a subsequently promulgated regulation, *Hodge* does not survive scrutiny in light of *Rufo*. In *Rufo* this Court held that just because a consent decree may require a state or local government to do more than the Constitutional minimum, that does not warrant modifying the decree. This Court explained:

> Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated. But we have no doubt that, to 'save themselves the time, expense, and inevitable risk of litigation,' petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found *by undertaking to do more than the Constitution itself requires* (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement. Accordingly, the District Court did not abuse its discretion in entering the agreed-upon decree, which clearly was related to the conditions found to offend the Constitution.
>
> To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive

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notice specifically advise the tenant that she could file a grievance and how to do so. 862 F.2d at 860-61.

to negotiation of settlements in institutional reform litigation. The position urged by petitioners

> would necessarily imply that the only *legally enforceable* obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards. . . . Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements. Procedurally, it would make necessary, as this case illustrates, a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action. *Plyler v. Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991).

Rufo, 502 U.S. at 389-90, 112 S.Ct. at 762-63 (emphasis added; citations and footnote omitted). After *Rufo*, therefore, it is questionable whether *Hodge* remains good law, insofar as *Hodge* seems to hold that a consent decree must be vacated once regulations are promulgated which meet the Constitutional minimum.

PHA's professed concern that the Third Circuit's decision in this case somehow conflicts with one of its earlier decisions, *Brown v. P.H.A.*, barely deserves a response. 350 F.3d 338 (3d Cir. 2003). The Court of Appeals in this case aptly distinguished the decree at issue in *Brown* from this one, mainly because the *Brown* decree had nothing like ¶13, but also because the plaintiffs in *Brown*, unlike respondents here, failed to show that that decree "provide[d] greater protections than the HUD regulations and remain[ed] useful for tenants . . . ." App. pp. 9a-10a, n.3. In any event, the Third Circuit

correctly noted that the statement in *Brown* now cited by petitioner was mere dicta, so even if there were a real conflict (which there isn't) between the two Third Circuit cases, this Court would not need to concern itself with resolving it.[8]

C. PHA failed to establish that continuing to respect the Decree, as the Third Circuit ruled PHA must, will have any significant negative impact upon it, or upon other governmental entities.

PHA asserts that leaving the Consent Decree in force will have a "negative impact" upon it (and others). Even if that were true, a modest negative impact would not be sufficient to warrant vacating the Decree. *Rufo* teaches that when a consent decree governs state or local government and it requires the government to go beyond the Constitutional minimum, "a court should surely keep the public interest in mind in ruling on a request to modify based on a change in conditions making it *substantially more onerous to abide by the decree*. . . ." *Rufo*, 502 U.S. at 392-93, 112 S. Ct. at 764 (emphasis added). PHA did not show, in the lower court, that HUD's final regulations, or any other post-Decree change, have made it "substantially more onerous" for it to comply with the Decree.

As PHA concedes, the Decree hardly requires the district court actively to manage or supervise PHA's termination procedures. PHA brief p. 18. By its terms the Decree has no

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[8] PHA also professes concern for "uncertainty" it believes exists in the First and Fourth Circuit Courts of Appeal about the proper standard for testing consent decrees. *See* PHA pet. p. 17. The Consent Decree in this case, and the events which preceded and followed it, are rare enough that this case is hardly a good one with which to resolve such uncertainty, if indeed it exists.

bearing upon the substantive grounds for terminating a tenant from the Program. *See* ¶1 of the Decree. App. p. 38a. So long as PHA does not violate the Decree in a manner which would prompt the plaintiffs to seek its enforcement, the federal courts do not become involved at all. The Decree in this case is far less intrusive than, for example, the consent decree in the prison-reform case *Harris v. City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995) (decree contained detailed and expensive provisions governing prison operations), or the 80-page decree considered by this Court in *Frew*.

PHA made no factual showing about burden whatsoever in the district court. In its petition, PHA alleges only two supposed burdens attendant to the Decree, neither of which is significant. First, PHA claims the Decree's requirement that it give thirty days' advance notice before terminating Section 8 benefits (in contrast to the regulation which requires advance notice but does not specify any minimum period), "only delays valid terminations of assistance." This claim is misleading. As with almost any type of administrative (or judicial) appeal, it is inevitable that some Section 8 participants miss the appeal deadline *even though* they have a valid defense on the merits, simply because they do not understand or appreciate their rights, or are unable to exercise them.

Further, PHA's characterization of Section 8 terminations as either "valid" or invalid, disregards an important aspect of HUD's substantive regulations governing the termination of assistance. Many terminations are not the result of cut-and-dried application of binding law to simple facts, but rather are the product of PHA's exercise of discretion. *See, inter alia,* 24 C.F.R. § 982.552(c)(2) (giving housing authorities discretion to consider circumstances in making most

termination decisions). When a Tenant fails to appeal a termination, therefore, it is misleading to imply that the termination necessarily was "valid" in the sense of being indisputably "correct." The Tenant's failure to appeal may indicate instead that, for whatever reason, she failed to avail herself of the chance to present mitigating or other circumstances which might have persuaded PHA to exercise its discretion in her favor. For the many participants whose benefits would have been preserved had they appealed, the 30-day provision affords a modest measure of continued assistance before they lose the rent subsidy and, most likely, their homes.

The other supposed burden that PHA claims, relating to the selection of hearing officers, in fact is weightless. HUD's comment to the final regulations make it clear that it chose not to mandate the same level of detachment on the part of the hearing officer as the Decree mandates. But it is clear from HUD's comment that it was concerned that the hearing officer not be biased, and it strengthened the final regulation from its initial proposal to do so. HUD did *not* say that it meant to forbid a local housing authority from stipulating to the even stronger bias protection included in the Decree. *See* 49 Fed. Reg. 12,229-30. More generally, nothing in HUD's final regulations or HUD's comments shows that it intended to *forbid* local housing authorities from granting tenants *greater* protections than the regulatory minimum.[9]

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[9] Ironically, PHA's petition trivializes the differences between the Decree's protections and those provided by HUD's final regulations. For example, the ten-day appeal period afforded to Tenants under the Decree, PHA says, "is not significantly different" from the regulations, which guarantee no minimum appeal period. In taking that tack, PHA understates some of the benefits the Decree affords to Tenants. PHA also undermines its

Conclusion

For the reasons stated herein, as well as those articulated by the Third Circuit Court of Appeals, respondents respectfully ask that the petition for writ of *certiorari* be denied.

Date: July 27, 2007

George D. Gould, Esq.,
Counsel of Record
Paul A. Brooks, Esq.
Community Legal Services, Inc.
1424 Chestnut St.
Philadelphia PA 19102
(215) 981-3700

Counsel for Respondents
Vanessa Henderson, et al.

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own argument. Just as the Decree's protections for Tenants are relatively modest, when compared to the benefits mandated by the final regulations, the Decree's extra benefits hardly impose a significant burden upon PHA.

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No. 06-1507

IN THE

Supreme Court of the United States

PHILADELPHIA HOUSING AUTHORITY,
Petitioner,

v.

VANESSA HENDERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

ALAN C. KESSLER *
SUSAN J. FRENCH
VIRGINIA LYNN HOGBEN
WOLF, BLOCK, SCHORR AND SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
(215) 977-2000

Counsel for Petitioner Philadelphia Housing Authority

* Counsel of Record

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REPLY TO BRIEF IN OPPOSITION

Respondents argue in their Brief in Opposition that certiorari should not be granted because the Third Circuit's ruling was allegedly correct in that this Court's precedents can require federal courts to keep consent decrees regulating state and local governments in place "indefinitely" (Br. in Opp. at 6) for decades, even where the decree is no longer needed to protect any federal constitutional or statutory rights. That respondents and the Third Circuit can misread this Court's existing precedents this way demonstrates the seriousness of the issue here and the need for review and clarification by this Court.

I. Respondents' Assertion And The Third Circuit's Ruling That Consent Decrees Regulating State Agencies Can Continue "Indefinitely," Without Any Federal Constitutional Or Statutory Need, Violate This Court's Decision In *Frew v. Hawkins* And The Fundamental Principles Of Federalism

Respondents argue that the Third Circuit's ruling in this case is consistent with this Court's decision in *Frew v. Hawkins*, 540 U.S. 431 (2004), because in *Frew* this Court required that consent decrees remain in effect until "the objects of the decree have been attained." (Br. in Opp. at 5) (emphasis omitted) (quoting *Frew*). Respondents contend that a federal district court may properly be required to continue to enforce the Consent Decree against a state agency "indefinitely," twenty years after all federal due process need for the decree ceased to exist, because under paragraph 13 of the Consent Decree, the "objects of the decree" were allegedly "to provide Tenants with . . . additional benefits indefinitely" (Br. in Opp. at 6) and to provide specific "enduring protections." (Br. in Opp. at 2) (emphasis omitted).

That reasoning is contrary to both this Court's ruling in *Frew* and the basic principles of federalism. In *Frew* this Court did not suggest that consent decrees may regulate state and local government for decades, regardless of the absence of any need for court regulation to protect any federal right, simply because there was an alleged agreement to provide additional benefits "indefinitely." To the contrary, this Court made clear in *Frew* that the "objects of the decree," 540 U.S. at 442, must be viewed in light of and limited by the federal rights which the consent decree was designed to address. This Court specifically held in *Frew* that:

> "[i]f not limited to *reasonable and necessary implementations of federal law*, remedies outlined in consent decrees involving state officeholders may *improperly*

> deprive future officials of their designated legislative and executive powers."

Frew, 540 U.S. at 441 (emphasis added).

The Consent Decree in this case is not unusual – it did not stipulate to any duration, indefinite or definite. Indeed, the district court judge who entered the Consent Decree found that there was no agreement that the procedures it provided would remain in place regardless of need or beyond a reasonable time. (App. 66a-68a). The Third Circuit's reasoning that the federal court regulation must continue regardless of need therefore is not limited to this particular decree. Rather, such a rationale could be applied to justify continued and unnecessary court interference with state agencies and officials in countless situations.

Moreover, consent by officials of the Philadelphia Housing Authority ("PHA") holding office in 1982 cannot support long-term regulation of their successor officials 20 years later without any federal need. The limitations which the Constitution imposes on federal regulation of states and state agencies cannot be wholly disregarded on the basis of consent. *New York v. United States*, 505 U.S. 144, 181-83 (1992).

> "[D]eparture from the constitutional plan cannot be ratified by the 'consent' of state officials.
>
> * * *
>
> The interests of public officials . . . may not coincide with the Constitution's intergovernmental allocation of authority."

New York v. United States, 505 U.S. at 182-83. Future government policy is not a matter which can be freely contracted away to private parties. *See, e.g.*, Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 172-73 (Yale Univ. Press 2003). "The principle that drives representative democracy is that voters should have the power to pressure incumbents to

change policy or replace them with successors who will." *Id.* at 172.

Unchecked federal court regulation of state agencies also violates the Tenth Amendment's limitations, where, as here, a federal agency has promulgated subsequent regulations that provide protection from the same harms that the consent decree was designed to address, *e.g.*, protection of Section 8 recipients' due process rights. "The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. at 182. Thus, the sort of interminable "indefinite" court regulation of state officials who administer federally-regulated programs as advocated by the Third Circuit and by the respondents in their brief offends the Tenth Amendment as well as the principles of federalism.

The *permissible* "objects of the decree," to protect federal due process rights, were fully attained long ago. The district court judge who originally entered this Consent Decree held that in light of the subsequent federal regulations, which provided due process protections, there is no longer a need for a court decree to protect any federal right. (App. 12a, 52a). Neither the Third Circuit nor respondents have disputed this fundamental fact. Accordingly, the judgment of the Third Circuit, which requires continued federal judicial regulation of a state agency "for the indefinite future," is incompatible with "the allocation of power within our federal system" and must be reversed. *Board of Education v. Dowell*, 498 U.S. 237, 248, 249 (1991).

II. Respondents' Claim That The Conflicting Eleventh Circuit Decision In *Hodge* Is No Longer The Law Misinterprets This Court's Decision In *Rufo* And Demonstrates The Need For Further Clarification By This Court

Respondents make a brief one-sentence attempt to distinguish the Eleventh Circuit's decision in *Hodge v. Department of Housing & Urban Development*, 862 F.2d 859 (11th Cir. 1989), on facts irrelevant to the *Hodge* court's reasoning. Respondents point to nothing in the *Hodge* opinion that turned on whether future superseding federal regulations were unanticipated or that turned on the specific language of the consent decree.

Recognizing that the Third Circuit's decision here cannot be reconciled with *Hodge*, respondents argue primarily that there is no conflict because *Hodge* was decided before this Court's decision in *Rufo v. Inmates of Sulfolk County Jail*, 502 U.S. 367 (1992), and is allegedly therefore no longer good law. (Br. in Opp. at 11-13). That argument misreads *Rufo*. In *Rufo*, this Court did not narrow the grounds for modification which had existed under prior law; it *broadened* the grounds for modification of consent decrees regulating government agencies and made the standards *more flexible*. 502 U.S. at 378-83. This Court directed in *Rufo* that courts "should exercise flexibility in considering requests for modification of an institutional reform consent decree." 502 U.S. at 383. The fact that *Hodge* predates *Rufo* therefore does not diminish its validity.

Unfortunately, however, respondents' misunderstanding and cramped reading of *Rufo* is not unique. Language from *Rufo* has been used by parties and the lower courts to require lengthy hearings and erect hurdles to modification and vacatur of outdated and unnecessary consent decrees. *See generally, e.g.*, Sandler & Schoenbrod, *supra*, at 174-78. That respondents and the Third Circuit invoke *Rufo* to require a district

court to keep in place a now 25-year-old unnecessary consent decree demonstrates the need for this Court to address this problem.

In any event, the issue is whether there is a conflict between the circuits. Courts in the Eleventh Circuit hold that *Hodge* remains valid precedent after *Rufo* on the precise issue here, subsequent enactment or promulgation of hearing procedures as a ground for vacatur of a due process consent decree. *See, e.g., Lynch v. Sessions*, 942 F. Supp. 1419, 1426-27 (N.D. Ala. 1996). Thus, the conflict exists regardless of the merit or lack of merit in respondents' contentions.

III. Respondents' Claim That *Rufo* Requires A Showing Of An "Onerous" Burden Mischaracterizes This Court's Standards In *Rufo* For Modification Of Consent Decrees

Respondents' final contention is that the Third Circuit correctly required the Consent Decree to remain in effect because *Rufo* allegedly requires that a state agency seeking modification of a consent decree show that post-decree events "have made it 'substantially more onerous' for it to comply with the Decree." (Br. in Opp. at 14) (quoting *Rufo*). That argument again misstates this Court's holding in *Rufo*.

In *Rufo*, this Court did *not* hold that a showing of substantial burden or expense is required before a government agency can obtain modification of a consent decree. Rather, this Court held that modification is warranted where there is a significant change in law or factual circumstances. *Rufo*, 502 U.S. at 384. This Court held in *Rufo* that modification should be granted where a significant change in law has occurred which alters the appropriateness of the decree, regardless of whether there is any claim of burden. *Rufo*, 502 U.S. at 388.

Respondent's attempt to characterize the expenses the decree imposes on PHA as innocuous or "weightless" (Br. in Opp. at 14-16) is, moreover, inaccurate. Requiring a govern-

ment agency to divert limited resources to pay persons who do not contest that they were properly terminated from the program is not harmless or insignificant. The restrictions the Consent Decree imposes on the persons who can serve as hearing officers were specifically found by the United States Department of Housing and Urban Development to be "detrimental to the Section 8 participants." 49 Fed. Reg. 12215, 12229-30 (March 29, 1984). Indeed, respondents' minimizing of the impact of the consent decree directly contradicts their argument that the "additional benefits" provided by the decree are of sufficient importance to justify requiring court regulation of a government agency to continue indefinitely decade after decade.

Most importantly, however, the harm to the public interest from unnecessary long-term regulation of government agencies by consent decree cannot be measured solely by burden and expense of a particular decree. A consent decree regulating government officials intrudes on the ability of the responsible officials to make decisions on how best to allocate limited resources in the management of government programs and interferes with the fundamental federal structure set by the Constitution. *Frew*, 540 U.S. at 442 (consent decrees regulating government officials interfere with the ability of "officials, both appointed and elected, to bring new insights and solutions to problems allocating revenue and resources"); *Rufo*, 502 U.S. at 381 (consent decrees regulating government officials "reach beyond the parties involved directly in the suit and impact on the public's right to sound and efficient operation of its institutions") (quoting *Health v. DeCourcy*, 888 F.2d 1105 (6th Cir. 1989); *see also Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976). The fact that the program here, the Section 8 housing program, is a federal program does not change this. The program at issue in *Frew* was likewise a federal program, and this Court held in *Frew* that where state officials "administer a significant federal program, principles of federalism require that state officials with front-line re-

sponsibility for administering the program be given latitude and substantial discretion." 540 U.S. at 442.

The judge who originally entered this decree returned to PHA's officials discretion over due process hearings for Section 8 housing program participants. The Third Circuit violated this Court's dictates in reversing the lower court's decision and in taking administration of this aspect of the Section 8 program away from PHA's current officials, officials who have no history of violating participants' due process rights. At the same time, PHA is not bound by court or respondents' oversight in administering due process hearings for conventional public hous ing participants, as the decree that once governed such hearings was ordered vacated by a different panel of the Third Circuit that included Justice Alito. *See Brown v. Philadelphia Housing Authority*, 350 F.3d 338 (3d Cir. 2003). The absurdity of the Third Circuit's direction of "indefinite" court interference with half of PHA's operations, while permitting PHA's officials to exercise their discretion with respect to the other half on the same subject matter, cries out for action by this Court.

CONCLUSION

The petition for Writ of Certiorari should be granted and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ALAN C. KESSLER *
SUSAN J. FRENCH
VIRGINIA LYNN HOGBEN
WOLF, BLOCK, SCHORR AND
SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
(215) 977-2000

Counsel for Petitioner
Philadelphia Housing Authority

* Counsel of Record

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